S. Hrg. 104–864

VIOLENT AND DRUG TRAFFICKING CRIMES: THE BAILEY DECISION'S EFFECT ON PROSECUTIONS UNDER 924(c)

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

EXAMINING THE *BAILEY* DECISION'S EFFECT ON CERTAIN PROSECUTIONS OF VIOLENT AND DRUG TRAFFICKING CRIMES

SEPTEMBER 18, 1996

Serial No. J–104–98

Printed for the use of the Committee on the Judiciary

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VIOLENT AND DRUG TRAFFICKING CRIMES: THE *BAILEY* DECISION'S EFFECT ON PROSECUTIONS UNDER 924(c)

WEDNESDAY, SEPTEMBER 18, 1996

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:18 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine presiding.

Also present: Senators Grassley and Biden.

OPENING STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. I would like to welcome everyone to this hearing. I apologize for the delay, but as you may know, there was a rollcall vote that is still going on that started at 2 o'clock.

Our focus today will be on the issue of guns and drugs. We are here to find ways to provide enhanced mandatory penalties for those criminals who choose to use firearms in furtherance of their violent crimes or drug trafficking endeavors.

Until 1995, our message to criminals who mixed guns and drugs was quite simple: Guns and drugs are a recipe for disaster, and if you mix them, you are going to pay a price. The Federal Code was an effective tool for Federal prosecutors to get drug traffickers who used or carried firearms during or in relationship to their drug trafficking crime, to get them off our streets and behind bars.

The Supreme Court's December 6, 1995, decision in *Bailey* v. *United States* has clearly severely limited the effectiveness of this statute as a crime-fighting tool. As a result of the Court's decision, Federal prosecutors must now prove that a defendant actively employed a firearm during the drug trafficking crime.

The question before the committee today is not whether we should restore this crime-fighting tool, but rather how is the best way to do it. There are currently three proposals before the committee—one bill that I introduced, one introduced by Senator Helms, and we also have the administration's proposal. All of these proposals are an attempt to reach basically the same group of criminals—drug traffickers and other violent criminals who use a gun in the commission of a felony.

We will hear today from a variety of witnesses who will bring their various perspectives to the debate. Senator Helms, who will be testifying first today, became involved in the issue—he is really

involved in the issue now for the second time because he was first involved in drafting and passing the underlying statute. Now that the *Bailey* decision has been handed down by the Supreme Court, Senator Helms is back at this matter again. He has aggressively pursued a solution to this problem and our offices have been working very closely together to get to the point where we are today. We certainly are happy to have him here today and appreciate his insight on this.

We will also hear later from the Justice Department regarding the administration's proposal, as well as from past and present law enforcement officials who have had an opportunity to deal with the drugs and guns on the streets and in the courts. I believe that we can move legislation before this Congress adjourns. There is a broad consensus to act and to respond to the *Bailey* decision. We all want to communicate one very important message to violent criminals: When you join guns and drug trafficking, we are coming after you.

Let me just finally conclude before I turn to my colleague, the distinguished Senator from North Carolina, Senator Helms, with this one additional comment, and that is that we are seeking guidance from the witnesses today. I think there is a broad consensus that we need to address this Supreme Court decision. The Court, in essence, invited Congress to do this. There is a broad consensus, I think, in this country that violent offenders, those who use a gun in the commission of a felony, need to have very, very severe sentences, that those sentences need to be enhanced if they do, in fact, commit the crime with a gun. I think there is also a very broad consensus in this country that the use of drugs, drug sales and guns also must mandate an enhanced penalty.

This is an issue that I have personally been dealing with for now 15 or 16 years. When I was in the State senate in the State of Ohio, I wrote Ohio's mandatory sentencing bill and that bill included a very specific provision that enhanced the sentencing and made it mandatory if someone used a firearm in the commission of a felony. With that brief introduction, it is my pleasure now to turn to my colleague from North Carolina, Senator Helms. Senator, thank you very much for joining us.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman, thank you very much, and Senator Grassley. I can't tell you how much I appreciate your scheduling this hearing regarding *Bailey* v. *United States* which enables criminals, to put it bluntly and frankly, to avoid tough prison sentences by merely concealing their guns.

Now, if there is anybody in this broad land who ought not to be even considered for gun ownership, it is people who deal in drugs, and there could not be a worse time to go soft on criminals. But when the Supreme Court's decision was announced, hardened criminals all across America were overjoyed by the prospect of prison doors swinging open to them and for them. Sure enough, since the *Bailey* decision last December 6, hundreds of criminals have indeed been set free.

Now, I feel strongly that Congress is morally obligated to correct this latest blunder by the Supreme Court, and that is why I introduced S. 1612, which you referred to earlier in your remarks, Mr. Chairman. S. 1612 requires a 10-year mandatory minimum sentence for any violent or drug trafficking felon having a firearm in his or her possession during the commission of a heinous crime. This legislation will send a clear message, I think, to criminals. If you use a gun in any way to further your violent criminal behavior, you get a minimum of 10 years in the slammer. Mr. Chairman, 20 Senators are cosponsors of S. 1612; 8 of those 20 serve on this Judiciary Committee.

This bill is intended to crack down on gun-toting thugs, and that is the best way to describe them that I can think of, people who commit violent felonies and drug trafficking offenses. Moreover, it will ensure that criminals who possess a firearm while committing a violent or drug trafficking felony will receive stiff punishment, and that is just common sense. Violent felons who possess firearms are more dangerous than those who don't. This legislation does not apply to anyone, of course, who is lawfully possessing a gun.

It may be useful to review how we got to this point. Current Federal law states that a person who, during a Federal crime of violence or drug trafficking, uses or carries a firearm, is sentenced to 5 years in prison. And this is a very effective law; Federal prosecutors have used it more than 9,000 times to add 5 additional years to the prison sentences of criminals who use or carry firearms. 800 of those instances occurred in North Carolina.

But along came the Supreme Court with its unwise decision to undermine the prosecution of violent criminals because the decision requires that a violent felon, "actively employ," a firearm in order to receive the additional 5-year sentence. The Court held that a firearm must be brandished or fired, or otherwise actively used. So if a criminal only possesses a firearm but doesn't fire it or otherwise use it, he escapes the additional 5-year penalty and can defer killing a victim until the next time around.

Somebody put it this way: A felon who stashes a gun with his drugs or one who hides a weapon in a crackhouse when he hears the cops coming will perhaps get off with a slap on the wrist, thanks to this decision by the Supreme Court. But the Court did issue this invitation to the Congress, and that is the reason I am sitting here and the reason you are sitting there right now. The Court said, "Had Congress intended possession alone to trigger liability * * * it could easily have so provided." OK, Mr. Chairman. That is precisely the point of this legislation, to make clear that possession alone by a drug dealer does indeed trigger liability.

Let us turn it around. This Supreme Court decision has weakened Federal law; it has weakened the potential for dealing with felons, violent felons, and it has already led to the early release of hundreds and hundreds of violent criminals. After the word got out about the *Bailey* decision by the Court, prisoners began frantically preparing and filing motions to get out of jail as quick as they could. Prosecutors were inundated with habeas corpus appeals.

One example is a man named Lancelot Martin, who ran a Haitian drug trafficking operation down in Raleigh, which is my hometown, the capital city of North Carolina. Mr. Lancelot Martin used

the U.S. Postal Service to receive and sell drugs and he was arrested in Raleigh. The police seized his drugs and they recovered a 9-millimeter semi-automatic pistol that Mr. Martin used to protect his drug business.

Now, Lancelot Martin was convicted on drug trafficking charges and received a 5-year sentence for using the gun. But on March 11 of this year, long before his sentence would have expired, Lancelot Martin walked free simply because while both his gun and a hefty supply of drugs were found, the gun was not actively employed at the time he was caught.

So you see, Mr. Chairman, S. 1612 will ensure that future criminals possessing guns, like Lancelot Martin did, will serve real time when they possess a gun in furtherance of a violent or drug trafficking crime. Literally hundreds of other examples similar to those Lancelot Martin are in the court records all across this country.

Let me repeat, this legislation will increase the mandatory—and let me repeat for emphasis—mandatory sentences for violent armed felons. They will be increased to 10 years, and if the firearm is discharged, the term of imprisonment will be 20 years. If somebody is killed as a result of this crime, the penalty is death or mandatory life imprisonment. This bill also proposes to increase to 25 years the mandatory sentences for second and subsequent offenses.

It is an unfortunate fact, Mr. Chairman, that the current administration has focused more on midnight basketball games than prison sentences that will cause criminals to think about the penalties awaiting them. Instead of moral leadership, I fear that the White House has projected, at best, an ambiguous cultural message to the young people of America.

The President of the United States has himself joked on MTV about his own drug use. His Surgeon General has suggested that narcotics be legalized. The White House drug office has been gutted. Reports of drug use at the White House are rampant, and the Attorney General herself—and she is a nice lady—has testified against mandatory minimum sentences for drug dealers.

So what are we to assume by all of this? I will tell you in terms of statistics. Prosecutions of drug criminals have dropped 20 percent under the Clinton administration. Drug prosecutions have declined 12 percent in the past 2 years. The tragic and predictable result of all of this, Mr. Chairman and Senator Grassley, is skyrocketing drug use among teenagers in this country.

I don't want to sermonize anybody, but fighting crime is and must be a top concern in our country. It has been estimated that one violent crime is committed every 16 seconds in the United States. I, for one, and I am sure most of you agree—we have just got to fight back with the most severe punishment possible for those who terrorize law-abiding citizens. And I submit, Senators, that enactment of this legislation is a necessary step toward recommitting our Government and our citizens, and therefore our country, to a real, honest-to-God war on drugs.

I thank you again for scheduling this hearing and I thank you for allowing me to appear.

Senator DEWINE. Senator, thank you very much not only for your testimony, but for your leadership and your continued leadership in this area. I don't think there is anything more important

that we can do if we are really interested in dealing with the crime problem in this country than to target violent offenders, to target people who use a gun in the commission of a felony.

Senator HELMS. I agree.

Senator DEWINE. The nexus between drug trafficking and guns has always been there. It was there 20 years ago when I was a county prosecuting attorney. It goes with the territory, and I think we have to do what we can in this Congress to regain the ground that, frankly, we lost in that Supreme Court decision, regain the ground for the citizens against the armed criminals and make sure everyone understands that these criminals are going to pay a very heavy price if they have a gun. If that is part of the offense, they are going to pay a very heavy price.

Let me turn to my colleague, Senator Grassley, for either any opening comments or any questions for Senator Helms.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. First of all, thank you very much for your leadership in this area, and you have noted many members of this committee—I think more than a majority, you mentioned, are cosponsors of your bill. I am happy to be one of those cosponsors of your bill, and I think you are responding in a very common-sense way to what everybody feels is a common-sense approach. Consequently, I feel, then, a majority of the people obviously are not going to find sympathy with the Supreme Court, regardless of how sincere they might have been in what they might call a strict interpretation of the law.

Let us suppose that they are right, that that is what the law calls for. Then, obviously, it calls for us to step in and to change the law to make sure that it doesn't encourage further use of guns in criminal activity. I think your legislation is doing nothing more than just returning the law to what everybody thought it had been, as best exemplified by a lot of lower court decisions.

We are going to have greater certainty in the law with the passage of your legislation because, in the meantime, if we don't, the Supreme Court decision is going to leave in a quandary situations that lower courts had fairly stabilized over a long period of time.

So I don't have an opening statement. I don't think on this issue we need an opening statement. It is the sort of thing that just everybody looks at and says, well, how could the Supreme Court do it. We don't want to question their motives, but we do want to make sure that what we thought was certain law, now fairly uncertain law, once again becomes certain law. So you do that, I believe, in as simple a way as you can, and we have to do it and we are glad you are leading the way.

Senator HELMS. Well, thank you very much, Senators. I will say for the Supreme Court, having criticized the distinguished Court, that they told us exactly how to remedy, and I assume that they agree that the measure that we now have not only is needed, but would be constitutional.

I thank you very much.

Senator DEWINE. Senator, thank you very much.

We will turn now to our second witness, Kevin Di Gregory. Mr. Di Gregory is a Deputy Assistant Attorney General in the Department of Justice's Criminal Division.

Thank you very much for joining us.

STATEMENT OF KEVIN DI GREGORY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. DI GREGORY. Thank you, Senator DeWine, for inviting us. We appreciate it.

Senator DEWINE. We have your written statement which, of course, is a part of the record and you can proceed from either that statement or however you want to proceed.

Mr. DI GREGORY. Thank you, Senator DeWine, Senator Grassley. My name is Kevin Di Gregory and I am a Deputy Assistant Attorney General in the Department of Justice Criminal Division. It is truly a privilege to appear before you today, and I welcome the opportunity to discuss with you a number of issues relating to our ability to prosecute and punish dangerous offenders who abuse firearms, particularly those who employ firearms to effectuate violent criminal activities and drug distribution.

Currently, title 18, United States Code, section 924(c), makes subject to a mandatory minimum punishment beyond that imposed for the predicate crime whoever "uses or carries a firearm" during and relation to a crime of violence or a drug trafficking crime. Prior to the Supreme Court's last term, the Federal appellate courts broadly construed the term "uses" in that statute to embrace not only instances where the defendant brandished, fired, or displayed a firearm during a crime of violence or drug trafficking offense, but also to those situations where a defendant kept a firearm available to provide security for the transaction, its fruits or proceeds, or was otherwise emboldened by its presence in the commission of the offense.

Under this interpretation of the term, "use" could be inferred from the presence of a firearm in proximity to narcotics, drug proceeds, or a drug trafficking transaction. Likewise, the strategic placement of a firearm in a room or a building used as a drug distribution or processing center would constitute "use" within the meaning of section 924(c) under what some appellate courts termed the "drug fortress theory."

In *Bailey,* the Supreme Court rejected this line of analysis. Reasoning that such a broad construction of the term "uses" leaves no role for the "carries" prong of section 924(c), the *Bailey* court concluded that Congress must have intended "uses to reach only situations where the firearm was actively employed during the commission of the crime."

As a consequence of this narrow judicial construction, the "uses" prong of the statute now applies only to instances where a defendant brandishes, displays, fires, or attempts to fire a firearm in the commission of a crime of violence or a drug trafficking crime, or where the defendant uses a firearm as an item of barter or perhaps refers to the presence of the firearm to facilitate the offense. As a result, the statute no longer embraces those situations where the

defendant employs a firearm to facilitate a drug trafficking crime by keeping it available to safeguard the transaction or its proceeds.

The committee has asked me to discuss the three legislative proposals, including an administration proposal, that are now pending in the Senate to return the coverage of 924(c) to embrace such activities. All three, which we support in principle, share the common feature that they predicate culpability under that statute upon possession of a firearm in relation to the underlying offense, and thus eliminate the requirement of the *Bailey* Court that the firearm be actively employed by the offender in some particular way.

Permit me briefly, if I might, to comment upon each of the proposals and compare them to one another.

Your bill, Senator DeWine, S. 1945, would insert after the phrase "uses or carries a firearm" the phrase "or has a firearm in close proximity to illegal or drug proceeds, in close proximity at the time of his or her arrest, or in close proximity at the point of sale of illegal drugs." Thus, under your formulation, many of the situations where the pre-*Bailey* courts would have found "use" by reference to strategic placement of a firearm in relation to a drug trafficking offense would again be covered. While we applaud your efforts at doing so, we have a number of concerns with the proposal that I will briefly address.

First, the amendment appears to apply only to drug offenses and not to possible crimes of violence in which the defendant has a firearm but does not actively use it. In our view, any amendment to deal with the *Bailey* problem should embrace crimes of violence as well as drug trafficking crimes.

Second, 924(c) was intended to deter the enhanced danger resulting from the employment of a firearm during and in relation to a crime of violence or a drug trafficking crime. Making punishable the presence of a firearm near drugs or drug proceeds at the time of an arrest without reference to any underlying crime doesn't seem to advance that purpose. The amendment should continue the extant legislative policy of punishing employment of a firearm during and in relation to the commission of a predicate offense and not make the predicate event an occasion that might precede or follow such a crime.

Finally, the phrase "in close proximity" is, in our view, ambiguous and therefore could be subject to disparate judicial interpretation and application. We would prefer adoption of the phrase "possesses a firearm," as the word "possesses" has been well defined in the law and would appear to be broader in scope than the phrase "in close proximity."

The legislation introduced by Senator Helms and the bill proposed by the administration share several common features which I can address simultaneously. First, both formulations substitute for the phrase "uses or carries" the phrase "possesses." This language would, in our view, cover virtually all the situations to which the Federal courts applied 924(c) prior to *Bailey*.

The term "possesses" is both broad in scope and well defined in Federal jurisprudence, as I have noted previously. It applies to both actual and constructive possession; that is, instances where, although the defendant does not have actual possession of the fire-

arm, he has the ability to exercise dominion or control over the firearm either directly or through others.

Both the administration proposal and S. 1612 provide for enhanced penalties beyond those for mere possession where a defendant actually discharges a firearm during the course of a crime. We also note that Senator Helms' amendment would impose a 10-year mandatory enhancement where any firearm is possessed, as compared to the 5-year minimum mandatory now in place, and a 30-year enhancement identical to that already in place in cases where the firearm possessed is a machinegun, destructive device, or is equipped with a silencer. We believe that to maintain consistency with the present sentencing scheme, S. 1612 would need to include an intermediate category for purposes of sentence enhancement when the firearm employed is a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon.

We note, last, that there is a missing component in both S. 1612 and S. 1945 that, while not strictly aimed at the *Bailey* decision, is nevertheless important in dealing effectively with the problem of criminal firearms misuse, and I am referring now to the so-called civil rights restoration provision in the Federal firearms laws addressed in the administration bill that allows dangerous felons in some cases to lawfully acquire firearms.

One of the most serious problems hindering our prosecutors' enforcement of Federal firearms statutes arises from the definition of "conviction" in 18 U.S.C. 921(a)(20). Under 18 U.S.C. 922(g), it is unlawful for a convicted felon to possess a firearm. Section 922(g) violations also serve as a basis for the mandatory penalties applicable under the Armed Career Criminal Act for 922(g) violators who have three or more crimes of violence or serious drug trafficking convictions. What is a "conviction" is therefore vital to the enforcement of these important provisions.

Prior to the 1986 Firearms Owners' Protection Act, a conviction for purposes of Federal firearms prohibitions was a question of Federal and not State law. Federal law provided that once an individual was convicted of a felony, that person remained under Federal firearms disability irrespective of State laws purporting to restore the person's right to possess firearms. Offenders could apply to the Secretary of the Treasury for relief from that firearms disability. The 1986 act, however, changed this policy and provided, in 18 U.S.C. 921(a)(20), that a conviction for which a person has had civil rights restored generally "shall not be considered a conviction" under Federal firearms statutes.

We believe that the 1986 amendment has had adverse effects from the standpoint of public safety. This results from the fact that about half the States have laws that provide for some form of automatic firearms rights restoration, including several States that provide for such restoration after a waiting period, and at least one State that automatically restores firearms possession rights immediately upon completion of a felon's sentence, so that the felon is enabled to walk directly out of prison into a gun dealer's establishment and try to legally arrange the purchase of a firearm. Other States allow restoration of rights automatically, except for certain category of felons, typically those convicted of violent crimes, while

still other States make restoration automatic for some types of firearms but not others.

Under the administration's proposed amendment, no State restoration of rights laws would be effective with respect to Federal firearms rights if the person's conviction was for a State crime that was a violent felony or a serious drug offense, as those crimes are defined in the Armed Career Criminal Act.

We believe that this proposal enjoys a wide spectrum of support and we note that the National Rifle Association, on May 5, 1992, before a subcommittee of this committee, testified against allowing those convicted of violent crimes or drug trafficking offenses to recover the right to own a firearm.

Enactment of this proposal, we believe, would greatly improve Federal enforcement of firearms prohibitions relating to convicted felons. We urge its inclusion in any legislation considered by the Senate to deal with this problem of firearm misuse relating to drug offenses and crimes of violence.

This concludes my statement. I would be pleased to answer, or at least to try to answer any questions you might have.

Senator DEWINE. Thank you very much. I am going to go a little out of order at this point. Senator Grassley has several questions that he would like to ask. He has another obligation at 3 o'clock and so I am just going to turn to Senator Grassley.

Senator GRASSLEY. Thank you; really, only two questions.

Mr. DI GREGORY. Good afternoon, Senator; nice to see you again.

Senator GRASSLEY. First of all, has this decision, the *Bailey* decision, resulted in an increase in habeas corpus petitions seeking sentence reductions or early release, and if you could in your answer give some detail on the number of petitions and the success of the petitions? If you don't have the exact number, you might be able to submit that number to us, but could you at least tell us your observation of this?

Mr. DI GREGORY. I think it has resulted in an increase in the number of habeas corpus petitions, but I don't have a number for you and I would be glad to provide that for you at a later time.

Senator GRASSLEY. Some sort of judgment from, again, a general point of view on the success of the petitions?

Mr. DI GREGORY. I don't have a judgment, but I will be glad to get that information to you.

Senator GRASSLEY. OK. Prior to the *Bailey* decision, how frequently did the Justice Department use 924(c)? How many of those instances involved this issue?

Mr. DI GREGORY. Senator, if I recall correctly, I think that—and I will have to get you the exact number, but we did use 924(c) in terms of those persons who were possessing the firearms and did not brandish them or fire them or use them in any way like that. But I can get you the numbers on that.

Senator GRASSLEY. OK, if you can supply that, and then your analysis of it, I would like not only just the numbers, but somehow how you or the Department of Justice feels about that trend.

Thank you.

Mr. DI GREGORY. Thank you, Senator.

Senator DEWINE. Thank you very much.

Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, thank you. Let me begin by commending you for holding this hearing. Having been here, like Senator Grassley as well, when we wrote this legislation, I was quite frankly surprised at the Court's decision. I mean, this can't even be characterized as a liberal or a conservative decision. This was a unanimous decision. Everyone from Scalia on down voted for this position, and it seems so out of sync with what we intended.

I mean, if I am not mistaken—I don't want to be held to this for certain; I have to check the record, but I think when I spoke to this on the floor at the time it was passing I was awful clear about it. But then again I remember Justice Scalia's admonition relative to when you are looking for congressional intent. He said something to the effect, in one case, everybody knows staff writes those things anyway, so why should we pay attention to them? He is wrong about that, but that is what he said. But, nonetheless, it did surprise me.

I think the Court, in interpreting the provision, said that the defendant uses a firearm only when actively employing it in some way. That was not what we intended, and you are right that we have to clear this up. I think the Court went wrong. When we wrote the statute, we didn't intend such a narrow reading. As we will hear about today, guns can play a very significant role in crimes even if they aren't brandished or fired.

A drug dealer keeps a loaded gun in a suitcase nearby just in case the deal goes bad. A robber keeps a gun in the glove compartment of his truck just in case he needs it while fleeing the scene of a crime. You can give hundreds of examples. The point is that individual or the people involved are no less secure by the fact that they don't know that the guy has a gun in his pocket, in his briefcase, in his possession. The gun itself, strategically placed and accessible, ups the ante of any crime and greatly increases the risk of serious bodily injury.

What are all these laws about? When we enhance penalties, whether they work or not, one of the underlying purposes—the rationale is we are trying to dissuade people from engaging in that activity. The bottom line here is what we intended was we don't want people carrying guns, committing crimes. We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person who doesn't.

What we are attempting to do here is when the criminal is thinking of undertaking an activity, if, in fact, penalties dissuade at all, they leave their gun at home. That is the intention of this because there are hundreds of cases that the Justice Department could cite for us, I am sure, and you in your former prosecutorial days, and me in my former days of being on the other side of this equation as a defender, where the person never intended to use the gun, but panicked. But the result is the same. Somebody is injured, somebody is dead, somebody is in trouble.

So the idea of possession is well-known in our law and has been fleshed out by our courts. In fact, the Sentencing Guidelines specifi-

cally provide for guideline enhancement where the defendant "possesses" a gun as part of a crime, and the word has been interpreted in ways that I believe make sense.

For example, in a seventh circuit case, a guy who sold drugs in a parking lot was arrested on his way back to his car. There, the police found a gun under the front seat. The court ruled the defendant possessed a gun in relation to the drug crime. That is *United States* v. *Rush,* 1989.

In a ninth circuit case, a man was arrested as he walked down the street toward the bank. The police found a gun underneath his jacket. He was convicted of attempted bank robbery and the court ruled that he possessed a gun in relation to the crime, even though he never entered the bank—*United States* v. *Moore,* 1978.

The Supreme Court, in the *Bailey* case, said the defendant would have been held to have possessed a gun because when the police found drugs in the front seat of his car, they also found a gun in the trunk. So possession under the law appears to come down to this: the gun is in the proximity of the crime and accessible in relation to the crime.

Let me also say while I support fixing the legal standard interpreted in *Bailey,* I think it unwise to change the basic penalty of the statute by increasing the mandatory minimum from 5 to 10 years. Let us not forget the nature of the penalty. It is an enhancement for having a gun and it is imposed on top of a penalty that is the underlying penalty that would be received.

Here is my concern about increasing mandatory minimums in the statute. First, I am concerned that it could backfire. I am concerned that we will see fewer prosecutors use the statute, and I know people don't think that occurs, but prosecutors sit down and say, OK, this is a case that the underlying crime would get 2 or 3 years; by bringing the gun into it, I am going to put the person away 12 years; I don't want to do that. So they end up pleading out to something else. I mean, you make the penalties mandatory minimums and too high and sometimes they have a counterproductive effect on prosecuting those cases, and sometimes has an effect on juries as well.

Prosecutors will see that it just doesn't make sense to put a low-level mule in a drug transaction behind bars for an extra 10 years because he has an unloaded hunting rifle in his pickup. I mean, he may conclude he is not going to do that if this is 10 years, which raises in my mind another problem with these kinds of penalties. They treat different types of offenders the same, which means that the bad guys get the same punishment as the person who has considerably less blame. But that is another time, that is another debate, that is another story. I think we should just fix what is broken here, and I hope we will keep our eye on the ball and change the legal standard in the statute, while making sure that dangerous criminals are the ones treated the most severely.

Again, I empathize and sympathize with the approach taken by Senator DeWine, but I think that the Justice Department is right. This is an unusual day. The record should note that Biden, the Justice Department and Jesse Helms all agree on something. I promise it will never happen again, Mr. Chairman, where I choose Jesse's way.

But all kidding aside, I think because there is a standard, because the word "possess" has been interpreted in the law, because we know what it means in other circumstances, I think it is the wisest, surest way to go. I am confident, knowing you, that you did not intend merely to cover only drug crimes; at least I assume you didn't. You wish to cover violent crimes as well, and so I think the best way to do it is the way suggested. Again, I want to thank you, Mr. Chairman, for being so vigilant and moving so rapidly on this.

Again, in conclusion, talk about something missing between the cup and the lip. I mean, the idea that the entire Supreme Court concluded that we, in fact, did not intend what we intended should be a lesson at least to me that I should be considerably more explicit than I thought I had to be in light of the way the Court is looking at legislative intent. I also would suggest that the point made by the Justice Department on the other matter is also well taken and we should look at that as well.

I don't have any questions because I agree with you. I learned from the first trial lawyer I ever worked for, you know, when the witness agrees, stop asking questions. So I don't have any questions.

Senator DEWINE. Thank you very much.

I think it is important to keep our eye, as Senator Biden says, on the ball and fix what is broken, and I guess that would be my reaction to the Justice Department's statement about the whole issue of firearms disability. I think I probably agree with you on the issue. Whether we do it today, whether we do it in this bill, I think, is more a question of what is practical and what we can actually get done because I think it is important that we get this issue dealt with and we get that fixed.

The problem that you talked about as far as the firearms disability and whether or not we use a national standard, basically a preemption at the Federal level, or whether we allow the States to do it—that has been with us for some time, has it not? I mean, this is not a new problem. This goes back to, what, 1986?

Mr. DI GREGORY. It is not a new problem, but I can only tell you that it is a——

Senator DEWINE. Excuse me. I am not in any way saying it is not a problem. In fact, as I said, I think I come down on your side on this issue. I think it is a question of how we get it down and when we get it done.

Mr. DI GREGORY. I just want to let you know that this issue and this solution is something, based upon my conversations with folks, that is close to the hearts of many of the career prosecutors who work both at main Justice and out in the U.S. attorneys' offices.

Senator DEWINE. I have had conversations with career prosecutors that would lead me to the same conclusion.

Let me maybe back off a little bit from all the different nuances of the legislation, of the different proposals, because I think it is interesting that the basic objectives of all three bills are the same, and I think how we get that worked out in the language—that will be taken care of and can be taken care of. I would like to step back from that a little bit, though, and talk about the broad philosophy underlying the whole principle of using a gun enhancement provi-

sion and I would like to do it by maybe giving you an example and have you comment on what the policy should be.

My experience as a prosecutor was that when we tried to take down what we considered in Greene County, OH, in 1977 or 1978 a big-time drug dealer, that drug dealer would always have a gun; I mean, just always have a gun, and the gun would usually be stored literally on top of the money and on top of the drugs. I can think of several examples when we went after what we considered to be a major dealer in Greene County, OH. We went in there and our undercover agents' concern was that the undercover agent, because he had worked up to this big buy, knew where the money was stored, knew where the gun was, knew where the drugs were, and they were all in the same place.

What about that situation, a large quantity of drugs, gun right there with the money, with the drugs? But let us say the defendant in this particular case isn't there. Let us say you get a search warrant and you search this person's home, and you have underlying evidence to convince a judge to give you that search warrant. You have already made your case and you have already made your buy from this guy. Maybe you have made several buys, and you go in and this is it. You have your search warrant and you find a huge quantity of drugs, you find money, and you find a gun or guns, and they are right there and the defendant just happens that day not to be in the house when you execute the search warrant. What is the public policy here? Should there be an enhancement of the sentence because of that gun or not?

Mr. DI GREGORY. I think when you try to decide a public policy on whether or not there should be such an enhancement, you need to first look at the reason why you would—it seems to me the reason that this Congress used and that State legislatures have used, at least that prosecutors have understood them to use when punishing someone for possession of a firearm during the commission of a violent felony or a drug trafficking offense.

First and foremost, I think that the policy behind that is because the mere possession of that firearm is an inherently dangerous activity. Now, for it to become inherently dangerous, it seems to me that the possession has to be somewhat more immediate than the situation that you have posited, Senator DeWine. So I think the first thing you need to look to is, is there a danger that needs to be addressed, at least an immediate danger to either civilians or to law enforcement officers who may be executing a search warrant or executing an arrest.

Senator DEWINE. So if I understand you correctly, you would say in that case you believe, at least, that the public policy would not be to have an enhancement under those circumstances.

Mr. DI GREGORY. I am not necessarily saying that the public policy would be not to have an enhancement, but simply to say that the first factor that I would look to would be the danger inherent in the possession of that firearm during the offense.

Senator DEWINE. I guess my counterargument to that—and I appreciate your comment—would be that that gun was not placed with those drugs just by happenstance and that the mere fact that on that given day that individual, the defendant, was not in the house really should not in any way change the reason for the en-

hancement; that that person made a conscious decision. I would say, based on my experience in dealing with these individuals, the conscious decision was, hey, if somebody was going to try to rip me off, I am going to have a gun close and I am going to go get it and I am going to have it and I am going to use it, or at least threaten to use it.

So it seems to me that the public policy in that particular case would be that you should, in fact, use the enhancement, and I guess what I would look at is in the language—and we don't have to spend the time today necessarily, but in the language of the different proposals, you know, look to see which—make sure we have that particular circumstance covered.

If you want to respond, go ahead, that is fine.

Mr. DI GREGORY. I was just going to simply say that I think it is a question of whether or not the term "possession" would cover that situation. That is what we have been talking about.

Senator DEWINE. I guess my response would be that I believe that the language should be unambiguous in that respect, that we ought to take care of that, and frankly I think my language does. Frankly, I think that is a question of public policy that we should try to resolve in the legislation. Thank you very much.

Senator Biden, anything else?

Senator BIDEN. I have two questions. Those of you who follow this committee—and I am not being solicitous when I say this—it is seldom I disagree with Senator DeWine on these issues. Let me raise this question, and I am not sure of the answer. My staff, I think, agrees with Senator DeWine, by the way.

Senator DEWINE. I always thought you had great staff, Senator.

Senator BIDEN. In the ninth circuit, in *United States* v. *Willard,* a gun anywhere in your home, even if you were not at home, was, I understand it from—I did not read the case; my staff just handed me a note on this that indicates that that constitutes possession. But it seems to me that the underlying public policy relates to whether or not someone is going to, in the act of committing a particular crime, carry with him or her a weapon that either enhances the prospect that they might accidentally use it—if there is no gun, they can't use it—or that they take it along with the express purpose of using it. But the point is there is a direct, immediate nexus.

The public policy is we don't want the bad guy to be able to reach for, have in their possession, or use in any way this gun. I am a little concerned that when you are executing the search warrant and no one is near the seized evidence—that is, the defendant is nowhere in sight and there is a gun—that it stretches the nexus between the defendant and the use of the gun to a point where I don't know where you draw the line.

What happens if there is a shotgun in the house? What happens if there is an arrest on a drug deal and you go to get the guy and you find him, track him down, and a month later you find him in a home and he has got a shotgun locked in his gun case? I am not sure how attenuated this becomes where, again, the underlying public policy argument stops? I haven't made up my mind on it, but my inclination is I think there should be a direct nexus between the proximity of the individual at the time of the execution of the warrant and/or the crime and the gun.

But having said that, let me skip to the second point. I think Senator DeWine is correct about not including your second request in this legislation. We should fix what is broken. Even though I think we both probably agree with you—and let me be very blunt about it. The reason not to do that is that—the reason why the law was written the way it was is it was very much intended by those folks who wrote it—this was not written by gun controllers; this was written by those who believe that gun control is a bad idea in any of its aberrations.

So it was intended to give the States the ability to do that. I mean, that is what the guys who wrote the law intended. So if, in fact, we interject this into this debate, my guess is we will lose Senator Helms and everybody else out there—not everybody else; everyone who voted for that in the first place, and I think it may very well slow up the thing we can fix quickly where we have some unanimity.

But I want to ask you a substantive point, not just mention that political point. You define—and I think this would generate considerable debate—you define the proposal that you characterize any violent felony. If you look at title 18, section 924(b), the term "violent felony" means any crime punishable by imprisonment for a term exceeding 1 year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such a crime if committed by an adult. That is a pretty wide swath that you are picking up.

So under what you are suggesting in change, even though I understand what you are trying to get at and I agree with you, a violent felony may be a kid who, when he was 16 years old, had a knife in his or her possession and was convicted. Had they been convicted in an adult court, it would have been punishable by imprisonment, and now they are 34 years old and they want to own a gun and they have had a clean record since then. I think that is kind of carrying this pretty far.

Now, keep in mind this is a guy who thinks that because so many domestic violence crimes are pled down to misdemeanors—I think if you have a stay-away order, you should never be able to get a gun, and so on. So it is not that I am reluctant to—again, I don't know how attenuated we want this relationship to be. I am not a guy whose purpose is, nor am I suggesting you are—my purpose is not to outlaw guns. My purpose is to get guns out of the hands of the outlaws, so to speak. I sound like the NRA. I mean, I don't mean that and I take it back if I sound like the NRA. [Laughter.]

But all kidding aside, you know, this is getting awfully attenuated, in my view, when a violent crime is any crime punishable by a year. Is that what you mean by violent felony?

Mr. DI GREGORY. That is what is——

Senator BIDEN. Take your time to confer with your staff, if you would like. I am serious. We don't mind. I would rather you have—and you need not answer it now.

Mr. DI GREGORY. That is an issue that I think it is good to be concerned about. Quite frankly, I am simply gratified that two U.S. Senators—and I think the career people at the Department of Jus-

tice who are supportive of this provision would be gratified that two U.S. Senators are taking the time during a committee hearing to talk about it because I think it is an issue that needs to be discussed and, as you said, not today for action in this Congress, but I think it is an issue that needs to be discussed. And perhaps one of the things that we need to focus on when later discussing it is what the definition of the violent felony ought to be, what the enumerated felonies ought to be for such a disability to be incurred.

Senator DeWine, going back to your earlier question, I think, though, policy considerations aside—and, of course, the closer the danger factor being one factor to consider and the nature of the crime itself, of course, being a factor to be considered, that being a major drug trafficking offense, we believe, however, that our formulation of possession would, in fact, cover the situation that you describe.

Senator DEWINE. You believe that the language as in the administration proposal, as we have in front of us, would cover that?

Mr. DI GREGORY. So long as the possession is during or in relation to a drug trafficking offense.

Senator DEWINE. What about if the offense takes place, but the evidence you have to prove the nexus between the gun and the drugs comes in a search later on? You are telling me it is a question of proof?

Mr. DI GREGORY. It is a question of proof and it depends upon the factual circumstances surrounding the search.

Senator DEWINE. Thank you very much. We look forward to working with you.

Mr. DI GREGORY. Thank you.

Senator DEWINE. I think it is clear—and we are next going to have another panel of experts as well, but I think it is clear that this is something that we should be able to resolve. I mean, there is just absolutely no reason that in this Congress, I would hope, or if not in this Congress, in the next Congress very early, we should not be able to resolve a very narrow issue and find the common ground.

I think although we can go back and forth on the language and how to do that, I think there is a real consensus that Senator Biden says pretty well across the political spectrum that this is something we should be able to fix.

Thank you very much. I look forward to working with you.

Mr. DI GREGORY. Thank you.

[The prepared statement of Mr. Di Gregory follows:]

PREPARED STATEMENT OF KEVIN DI GREGORY

Mr. Chairman and members of the Committee, my name is Kevin Di Gregory. I am a Deputy Assistant Attorney General in the Department of Justice Criminal Division. It is truly a privilege for me to appear before you today and I welcome the opportunity to discuss with you a number of issues relating to our ability to prosecute and punish dangerous offenders who abuse firearms, particularly those who employ firearms to effectuate violent criminal activities and drug distribution.

Title 18 U.S.C. § 924(c) makes subject to a mandatory minimum punishment beyond that imposed for the predicate crime whoever "uses or carries a firearm" during and in relation to a crime of violence or a drug trafficking crime. Prior to the Supreme Court's last term, the federal appellate courts broadly construed the term "uses" in that statute to embrace not only instances where the defendant brandished, fired or displayed a firearm during a crime of violence or drug trafficking offense, but also those where the defendant kept a firearm available to provide secu-

rity for the transaction, its fruits or proceeds, or was otherwise "emboldened" by its presence in the commission of the offense. Under this interpretation of the term, "use" could be inferred from the presence of a firearm in proximity to narcotics, drug proceeds or a drug trafficking transaction. Likewise, the strategic placement of a firearm in a room or building used as a drug distribution or processing center would constitute "use" within the meaning of Section 924(c) under what some appellate courts termed the "drug fortress" theory.

In *Bailey* v. *United States*, 115 S.Ct. 501(1995), the Supreme Court, reversing the en banc District of Columbia Circuit, rejected this line of analysis. Reasoning that such a broad construction of the term "uses" leaves no role for the "carries" prong of a § 924(c) offense, the *Bailey* Court concluded that Congress must have intended "uses" "to reach only situations where the firearm was actively employed during commission of the crime."

As a consequence of this narrow judicial construction, the "uses" prong of the statute now applies only to instances where a defendant brandishes, displays, fires or attempts to fire a firearm in the commission of a crime of violence or drug trafficking crime, uses a firearm as an item of barter or, perhaps, refers to the presence of a firearm to facilitate such an offense. As a result, the statute no longer embraces situations where the defendant employs a firearm to facilitate a drug trafficking crime by keeping it available to safeguard the transaction or its proceeds or otherwise to embolden him in the pursuit of his unlawful activities.

The Committee has asked me to discuss three legislative proposals, including an Administration proposal, that are now pending in the Senate to return the coverage of Section 924(c) to embrace such activities. All three—which we support in principle—share the common feature that they predicate culpability under that statute upon possession of the firearm in relation to the underlying offense, and thus eliminate the requirement of the *Bailey* Court that the firearm be actively employed by the offender in some particular way.

Permit me briefly to comment upon each of these proposals and compare them to one another. S. 1945, introduced by Senator DeWine, would insert after the phrase "uses or carries a firearm" the phrase, "or has a firearm in close proximity to illegal drugs or drug proceeds, in close proximity at the time of his or her arrest, or in close proximity at the point of sale of illegal drugs." Thus, under this formulation many of the situations where the pre-*Bailey* courts would have found "use" by reference to strategic placement of a firearm in relation to a drug trafficking offense would again be covered by the statute. While we applaud Senator DeWine for his legislation we do, have a number of concerns with the proposal that I will briefly address.

First, the amendment proposed by S. 1945 appears to apply only to drug offenses and not to possible crimes of violence in which the defendant has a firearm but does not actively use it. In our view, any amendment to deal with the *Bailey* problem should embrace crimes of violence as well as drug trafficking crimes.

Second, Section 924(c) was intended to deter the enhanced danger resulting from the employment of a firearm during and in relation to a crime of violence or a drug trafficking crime. Making punishable the presence of a firearm near drugs or drug proceeds or at the time of an arrest, without reference to any underlying crime, does not advance that purpose. The amendment should continue the extant legislative policy of punishing employment of a firearm during and in relation to the commission of a predicate offense and not make the predicate event an occasion that might precede or follow such a crime.

Finally, the phrase "in close proximity" is, in our view, ambiguous and therefore subject to disparate judicial interpretation and application. We would prefer adoption of the phrase "possesses a firearm" a the word "possesses" has been well defined in the law and would appear to be broader in scope than the phrase "in close proximity."

The legislation introduced by Senator Helms (S. 1612) and the bill proposed by Administration share several common features which I can address simultaneously. First, both formulations substitute for the phrase "uses or carries" a firearm the phrase "possesses a firearm." This language would, in our view, cover virtually all the situations to which the federal courts applied § 924(c) prior to *Bailey*. As I mentioned earlier, the term "possesses" is both broad in scope and well defined in federal firearms jurisprudence. It applies to both actual and "constructive" possession, that is instances where, although the defendant does not have actual possession of a firearm, he had the ability to exercise dominion and control over a firearm either directly or through others. The scope of "actual possession" is exemplified by decisions holding that a firearm found in the trunk of a defendant's automobile or at his residence was, for purposes of the felon in possession statute, in his possession. The courts have held that "constructive possession" of a firearm by a defendant in-

cludes instances in which he or she was capable of exercising dominion or control over it through other participants in a criminal scheme.

Both the Administration proposal and S. 1612 provide for enhanced penalties beyond those for mere possession where a defendant actually discharges a firearm during the course of a crime. We also note that Senator Helms' amendment would impose a 10 year mandatory enhancement whenever any firearm is possessed (as compared to the five year mandatory minimum now in place), and a 30 year enhancement—identical to that already in place—in cases where the firearm possessed is a machinegun, a destructive device or is equipped with a silencer. We point out that, to maintain consistency with the present sentencing scheme, S. 1612 would need to include an intermediate category for purposes of sentence incrementation when the firearm employed is a short barreled rifle, short barreled shotgun or a semiautomatic assault weapon.

We note lastly that there is a missing component in both S. 1612 and S. 1945 that, while not strictly aimed at the *Bailey* decision, is nevertheless important in dealing effectively with the problem of criminal firearms misuse. I am referring to the so-called civil rights restoration provision in the federal firearms laws, addressed in the Administration bill, that allows dangerous felons in some cases to lawfully acquire firearms.

One of the most serious problems hindering enforcement of federal firearms statutes arises from the definition of "conviction" in 18 U.S.C. 921(a)(20). Under 18 U.S.C. 922(g), it is unlawful for a convicted felon to possess a firearm. Section 922(g) violations also serve as the basis for the mandatory penalties applicable under the Armed Career Criminal Act, 18 U.S.C. 924(e), for 922(g) violators with three or more crime of violence or serious drug trafficking convictions. What is a "conviction" is therefore vital to the enforcement of these important provisions.

Prior to the 1986 Firearms Owners' Protection Act, a conviction for purposes of federal firearms prohibitions was a question of federal, not State, law. Federal law provided that, once an individual was convicted of a felony, that person remained under a federal firearms disability irrespective of State laws purporting to restore the person's rights to possess firearms. Offenders could apply to the Secretary of the Treasury for relief from firearms disabilities. The 1986 Act, however, changed this policy and provided, in 18 U.S.C. 921(a)(20), that a conviction for which a person has had civil rights restored generally "shall not be considered a conviction" under federal firearms statutes.

The 1986 amendment has had adverse effects from the standpoint of public safety. This results from the fact that about half the States have laws that provide for some form of automatic firearms rights restoration, including several States that provide for such restoration after a waiting period, and at least one State that automatically restores firearms possession rights immediately upon completion of a felon's sentence, so that the felon is enabled to walk directly out of prison into a gun dealer's establishment and legally arrange to purchase a firearm. Other States make restoration of rights automatic except for certain categories of felons, typically those convicted of violent crimes, while still other States make restoration automatic for some types of firearms but not others.

Under the Administration's proposed amendment, no State restoration of rights laws would be effective with respect to federal firearms rights if the person's conviction was for a State crime that was a violent felony or a serious drug offense (as those terms are defined in the Armed Career Criminal Act, 18 U.S.C. 924(e)).[1]

This proposal enjoys a wide spectrum of support. For example, we note that the National Rifle Association on May 5, 1992, before a Subcommittee of this Committee testified against allowing those convicted of violent crimes or drug trafficking offenses to recover the right to own a firearm.

Enactment of this proposal would greatly improve federal enforcement of firearms prohibitions relating to convicted felons. We urge its inclusion in any legislation considered by the Senate to deal with the problem of firearm misuse relating to drug offenses and crimes of violence.

This concludes my prepared statement. I would be pleased to answer any questions that you may have.

Senator BIDEN. Mr. Chairman, I apologize. I just got a note. I have a very important matter on the transportation conference re-

[1] Until fairly recently, the courts of appeals were divided over whether a State restoration of rights law was applicable to a federal conviction. The Supreme Court answered this question in the negative in *Beecham* v. *United States*, 114 S.Ct. 1669 (1994) but this holding affords only modest relief since the overwhelming number of disabling felony convictions are state convictions.

port that is on the floor. I want to make sure Amtrak trains keep running in Ohio, and I am required to go to the floor.

Senator DEWINE. The few that we have left?

Senator BIDEN. The few you have left. But all kidding aside, I apologize to the next panel because I very much wanted to hear what they have to say. But they brought up this bill and it is a big deal to my State, this transportation bill which my State has not fared very well in, and I am required to go make my case. So I am going to have to leave. I apologize to the witnesses.

Senator DEWINE. We will take good notes for you, Senator.

Senator BIDEN. Thank you very much.

Senator DEWINE. Thank you.

If the members of the next panel could now come up, I will introduce them as they are coming up. To my immediate left is Sgt. Jeffrey Fluck, who is an active-duty law enforcement officer from Raleigh, NC. He has been a police officer for 19 years, 4 of which have been spent as a drug investigator. He also serves as the president of the North Carolina Police Benevolent Association.

Tony Wilson is a retired Drug Enforcement Administration agent. He was with DEA for 25 years and during that time he held positions as a criminal investigator, supervisor, and manager.

Thomas Hungar is currently an associate at Gibson, Dunn & Crutcher. He is also a former assistant to the Solicitor General in the Department of Justice.

Professor, I am going to mispronounce your name, I am sure. Will you pronounce your name for me?

Mr. ZLOTNICK. Zlotnick.

Senator DEWINE. Thank you very much. David Zlotnick is currently a professor of law at Roger Williams School of Law in Bristol, RI. Prior to that, he was an assistant U.S. attorney for the District of Columbia.

Sergeant, we will start with you, if that is all right.

PANEL CONSISTING OF JEFFREY R. FLUCK, PRESIDENT, NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION, RALEIGH, NC; ANTHONY M. WILSON, ASSISTANT SPECIAL AGENT IN CHARGE, DRUG ENFORCEMENT ADMINISTRATION (RETIRED), CHANTILLY, VA; THOMAS G. HUNGAR, GIBSON, DUNN & CRUTCHER, WASHINGTON, DC; AND DAVID M. ZLOTNICK, PROFESSOR OF LAW, ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW, BRISTOL, RI

STATEMENT OF JEFFREY R. FLUCK

Mr. FLUCK. Thank you, Mr. Chairman. Thank you for affording me this opportunity to give testimony on behalf of this initiative to improve a good piece of legislation and close up a loophole which has already begun to allow for the release of a wave of potentially violent criminals. Hopefully, this proposed legislation will prevent future abuses of this law and protect the public from the victimization suffered on a daily basis at the hands of that small portion of our population that has chosen crime as their profession.

As you said, I appear before you today as an active-duty law enforcement officer with over 19 years experience; 4 of these years were spent as a drug investigator. The remaining years were spent

on the street both as a uniform patrol officer and now in my current position as a uniform patrol sergeant. I also serve as the president of the North Carolina Police Benevolent Association and senior vice president for the Southern States PBA, a professional association representing over 15,000 street-level law enforcement officers. As a front-line witness and benefactor of the work your committee and everyone here on the Hill does, I urge you to help pass this bill.

Over the past several years, crime in this country has been reduced overall. There has been speculation by many diverse factions of the criminal justice community as to the causation factors in this decline. It is interesting to note, though, that during the 12-month period ending June 30, 1995, the Department of Justice documented the largest one-year prison population increase ever recorded.

State prison populations grew by 9.1 percent and the number of Federal prisons increased by 6.1 percent. It is the opinion of our association that the reduction of crime is directly linked to the increased and expanded incarceration of that small portion of our population that preys upon the innocent citizens of this country.

Bureau of Justice Statistics reports that 156,000 parole violators returned to State prisons in 1991. They committed at least 6,800 murders, 5,500 rapes, 8,800 assaults, and over 22,000 robberies during their average 13-month release into the community. Every good street cop knows that the longer prison term a criminal serves reduces that criminal's chances of committing additional and, many times, more violent crimes.

What is not as obvious, though, is the effect of keeping these criminals out of our neighborhoods with regard to stemming the development of the next generation of predators. The children of this country, Senator, are not born criminals. They become criminals through an apprenticeship program operated by the criminals that are present in their neighborhoods.

The one statement I recall from my drug training over 10 years ago was from a DEA agent that instructed in this statement, "Wherever there is cocaine, there is a gun," and I think you alluded to that earlier. During my 4 years in drug investigations, I would continually find this statement to be true.

However, few of the weapons recovered were ever found in the personal possession of the dealer. The weapon was either hidden nearby for easy access or handled by an associate, most times by these young apprentices. I recall one personal experience where this practice took place with the usual painful results.

In this case, an experienced drug dealer from New York had moved into a neighborhood in Raleigh and recruited a 14-year-old child to assist in his enterprise. I first arrested the child, known on the street as Glue, for selling crack cocaine to passing motorists. I tried hard to work with the district attorney and that child's attorney to turn his life around, but as quick as he would return to the street, his apprenticeship would continue.

My next encounter found this youth now holding a firearm for the dealer because this experienced dealer knew that while he needed a weapon close at hand to protect his interests, he could not afford to carry it himself while carrying on his drug trade. I am

here to tell you that that once innocent 14-year-old is now currently serving time in the State penitentiary in Raleigh for shooting a taxi driver while attempting to rob him. The drug dealer did not hesitate at Glue's conviction to recruit Glue's younger brother to take over the apprenticeship, eventually landing that younger brother in a detention facility, also. After leaving drug investigations, I have lost track of the dealer.

It is for this reason, Senator, if none other, that we ask you to close the loophole and increase the mandatory prison sentence for those who would possess a firearm in the commission of a crime of violence or drug trafficking so that maybe, just maybe, we can prevent those we are fortunate enough to catch and convict from getting out and recruiting more of our young children into the criminal profession.

Again, I want to thank you and this committee for both your time and consideration of S. 1612.

Senator DEWINE. Sergeant, thank you very much.

[The prepared statement of Mr. Fluck follows:]

PREPARED STATEMENT OF JEFFREY R. FLUCK

Thank you Mr. Chairman, and members of the Committee, for affording me this opportunity to give testimony on behalf of this initiative to improve a good piece of legislation and close up a loop hole which has begun to allow for the release of a wave of potentially violent convicted criminals. Hopefully, this legislation will prevent future abuses of this law and protect the public from the victimization suffered on a daily basis, at the hands of that small portion of our population that has chosen crime as their profession.

I appear before you today as an active duty law enforcement officer with over nineteen years experience. Four of those years were spent as a drug investigator, and the remaining years were spent on "the street" as both a uniform patrol officer and my current position as a uniform patrol sergeant. I also serve as the President of the North Carolina Police Benevolent Association and Senior Vice President of the Southern States PBA, a professional association representing over fourteen thousand street-level law enforcement officers. As a "frontline" witness and benefactor of the work each of you do here in the Congress, I urge you to help pass this bill.

Over the past several years, crime in this country has been reduced overall. There has been speculation by many diverse factions of the criminal justice community as to the causation factors in the decline. It is interesting to note, that during the twelve month period, ending June 30, 1995, the Department of Justice documented the largest one-year prison population ever recorded. State prison populations grew by 9.1% and the number of federal prisoners increased by 6.1%. It is the opinion of our Association, the reduction of crime is directly linked to the increased and expanded incarceration of the small portion of our population that preys upon the innocent citizens of this country. Bureau of Justice Statistics reports that 156,000 parole violators returned to state prisons in 1991 committed at least 6,800 murders, 5,500 rapes, 8,800 assaults, and 22,500 robberies during their average 13 month release into the community.

Every good street cop knows that the longer prison term a criminal serves reduces that criminals chances of committing additional, and many times, more violent crimes. What is not as obvious, is the effect keeping these criminals out of our neighborhoods has, with regard to stemming the development of the next generation of predators. The children of this country are not born criminals. They become criminals through an apprenticeship program operated by the criminals present in their neighborhoods.

The one statement I recall from my Drug Training over ten years ago, was from a DEA agent that said, "where ever there is cocaine, there is a gun." During my four years in drug investigations, I would continually find this statement to be true. However few weapons recovered were found in the personal possession of the dealer. The weapon was either hidden nearby for easy access, or handled by an associate, most times by these young apprentices.

I recall one personal experience where this practice took place, with the usual painful results. In this case, an experienced drug dealer from New York had moved

into a neighborhood in Raleigh and recruited a 14 year old child to assist in his enterprise. I first arrested this child, known on the street as "Glue", for selling crack cocaine to passing motorists. I worked with the District Attorney and the child's attorney, to try to turn his life around. But as quick as he would return to the street, his apprenticeship would continue. My next encounter found this youth now holding a firearm for the dealer, because this experienced dealer knew, that while he needed a weapon close at hand to protect his interests, he could not afford to carry it himself while carrying on his drug trade. That once innocent 14 year old, is currently serving time in the state prison for shooting a taxi driver while attempting to rob him. The drug dealer did not hesitate, to recruit "Glue's" younger brother to take over the apprenticeship, eventually landing the younger brother in detention facility also. After leaving drug investigations, I lost track of the dealer.

It is for this reason, if none other, that we ask you to close the loop hole and increase the mandatory prison sentence for those who would possess a firearm in the commission of a crime of violence or drugs, so that maybe, we can prevent those we are fortunate enough to catch and convict, from getting out and recruiting more of our children into the criminal profession.

Thank you, members of this committee, for both your time and your consideration of Bill 1612.

Senator DEWINE. I think what we will do is go through the entire panel and then open it up for questions.

Mr. Wilson.

STATEMENT OF ANTHONY M. WILSON

Mr. WILSON. Thank you, Mr. Chairman. It is a pleasure to appear today before the committee to discuss these significant issues relating to drug trafficking and violent crime.

My former agency, the Drug Enforcement Administration, during the past 5 years has lost 11 special agents in the line of duty. Of these 11 agents, 2 were killed as a direct result from a violent confrontation with an armed trafficker armed with a handgun. Routinely, law enforcement officers today are confronted with individuals that resist arrest and, as a result, are subdued with different levels of force, depending on the threat they present.

As organized criminal groups become more sophisticated and the competition in the drug trade continues to escalate, the violence among traffickers and the willingness to confront law enforcement officers also will escalate. In the course of the duties of a DEA special agent, high-risk situations often arise that uncover the presence of and result in the use of firearms. These high-risk situations are most often undercover operations, arrest situations, and raid executions where DEA makes lawful entry into dwellings to make arrests and secure evidence. One of the highest risk situations is encountered when a trafficker is delivering drugs to an undercover agent because at this point the trafficker is most vulnerable to attack by rivals or arrest by law enforcement.

Drug traffickers carry firearms for a number of reasons. The most obvious is, of course, for their own protection and the protection of their drugs in the event of a rip-off by rival traffickers. Trafficking drugs today is a lucrative trade and competition on an international scale, as well as on the street level, is quite fierce.

When an individual chooses a life of crime, and specifically the drug trade, there are several factors that have been considered and accepted. The necessity to arm themselves is often one of them. In many drug enforcement operations, firearms and other weapons are encountered and are frequently carried or used during the commission of these drug transactions.

In all narcotics enforcement-related instances, the law enforcement officer must mentally prepare him or herself for an adversarial conflict and assume, by the nature of the drug business, that the traffickers will be armed. Without this state of mind, the officer enters a tactical situation in which he is already disadvantaged and probably unprepared.

If an arrest or an enforcement situation is imminent and prior knowledge is received that a trafficker is armed or prone to violence, this tells the agent or the officer that the likelihood of violence is escalated. A trafficker, much as a police officer, makes a conscious decision to arm himself. A police officer is armed to protect himself and the public. The trafficker makes this decision to arm himself either for his own protection or to commit great bodily harm or murder.

An additional difference in the two is the consequences of the use of a firearm and the decisionmaking process that precedes that action. In order for a law enforcement officer to use a firearm during the course of his or her duties, vital decisions have to be made. The majority of enforcement agencies at every level train their officers that mental preparedness is vital to survival in a violent confrontation. In addition, proper planning, equipment, and good tactics are essential to success during these activities.

But if the situation results in the use of force, and more specifically the use of deadly force, the law enforcement officer operates under stringent guidelines that their adversaries do not. The law enforcement officer must observe and interpret a set of actions by the defendant and make a determination immediately of the intentions of the defendant and if the situation is life-threatening. He or she must also factor into the decisionmaking process the possibility of an innocent third party being injured should he or she decide to discharge their weapon.

A moral decision has to be made by the law enforcement officer as to whether or not the situation is so grave as to have to take the life of another human being. The officer also frequently questions what impact his actions will have on his career, family, and the community. Then there are the stringent guidelines of policy and procedure that govern proper police action, but have little bearing on life-and-death decisions that will be made in a split second. The Supreme Court has noted that these decisions are often made by law enforcement officers in tense, uncertain and rapidly evolving circumstances. The drug trafficker or violent criminal has none of these obligations.

Law enforcement officers do not have the luxury to make preemptive strikes against criminals and then settle their differences later. In law enforcement, and drug law enforcement in particular, the possibility of an eruption of violence always exists. Although most drug law enforcement investigations are somewhat proactive in the use of deadly force situations, the officer arrives at the scene with a serious disadvantage.

Progressive law enforcement training teaches us that the premise in an action versus reaction situation, such as the use of deadly force, is the law enforcement officer must first assess the threat and then react to it. The brain receiving the threat information I discussed earlier has to recognize and process that informa-

tion instantaneously and then send the body into motion. Again, the criminal has the advantage. He or she already knows what they are going to do long before the officer recognizes this.

During training exercises and reactionary testing, it has been determined that there is a significant lag time for the law enforcement officer in reactionary situations. When contemplating the use of deadly force, if the assailant has already committed himself to the use of that force, it is sometimes impossible for the officer to win this race. There is simply not enough time for the brain to perceive the threat, process the information, and react to the situation.

The issues that we are here discussing today are both timely, important, and bear serious consideration. From my perspective and the perspective of many of my colleagues, former agents and current, the act of having a firearm in close proximity to illegal drugs or drug proceeds or at the point of sale or at the time of arrest, or the act of carrying a weapon, a firearm, on one's person are, in reality, in the real world, one and the same.

The criminal has access to a firearm that can be made readily available for use. The fact that these criminals make decisions to arm themselves against rival traffickers or law enforcement is indicative of their willingness to use this weapon in a confrontation, and it also sends a strong message about the criminal's mindset. From my viewpoint, there is a clear willingness to use the firearm if the opportunity should present itself.

Thank you, Mr. Chairman. I have nothing further. If there are any questions, I would be happy to try to answer them.

Senator DEWINE. Thank you, Mr. Wilson.

Mr. Hungar.

STATEMENT OF THOMAS G. HUNGAR

Mr. HUNGAR. Thank you, Mr. Chairman. My name is Thomas Hungar. I appreciate the opportunity to address this distinguished committee on a subject of great importance, the effect of and appropriate legislative response to the Supreme Court's unfortunate decision in *Bailey* v. *United States*. I have submitted a written statement that I would ask be made part of the record.

Senator DEWINE. That will be part of the record.

Mr. HUNGAR. Thank you. Having presented argument on behalf of the United States in *Smith* v. *United States,* the Supreme Court's previous pronouncement on the scope of section 924(c), I have observed this issue with great interest and was particularly disappointed to see the Court cut back on the scope of section 924(c) in the *Bailey* case.

I fully agree with the witnesses who have testified this afternoon that Congress should act promptly to overrule the Supreme Court's unfortunate decision in *Bailey,* and I commend the committee for holding these hearings. Section 924(c) should again apply to all uses of a firearm during and in relation to a violent crime or drug trafficking offense, regardless of whether the use was passive or active.

Various legislative responses have been suggested and each of them, I think, is a step in the right direction. As I explained in my written testimony, S. 1945, which proposes a close proximity test, is an important and valuable contribution to this debate. Arguably,

however, that statute is too narrow in some respects because it is generally limited to drug offenses. In addition, there is some ambiguity in the scope of the provision criminalizing the possession of firearms in close proximity to an arrest.

In my view, S. 1612 reflects the strongest and most effective response to the *Bailey* decision and to the problem of violent crime in general. It makes clear that section 924(c) applies to the possession of a firearm during and in relation to a drug offense or violent crime, thereby overruling *Bailey* and reinstating the statutory interpretation that prevailed in the Federal courts prior to the *Bailey* decision. In addition, and unlike the administration's proposal, S. 1612 would enhance the penalties for violations of section 924(c) and make possible the imposition of the death penalty for such violations that result in death.

With respect to the scope of the possession language that has been suggested by Senator Helms and by the administration, I was glad to hear Deputy Assistant Attorney General Di Gregory state on behalf of the Justice Department that, in their view, that language would cover the hypothetical that you suggested, Senator DeWine, regarding the storage, if you will, if a gun is in close proximity to drugs and drug proceeds even if the defendant happened not to be present when the search and discovery of the drugs occurred. I think that is consistent with the proper interpretation of the possession language and the interpretation that the courts of appeals were applying before the *Bailey* decision.

In conclusion, I urge the committee to give S. 1612 its careful and favorable consideration. Thank you.

Senator DEWINE. Thank you very much.

[The prepared statement of Mr. Hungar follows:]

PREPARED STATEMENT OF THOMAS G. HUNGAR

Thank you, Mr. Chairman. My name is Thomas G. Hungar. I appreciate the opportunity to address this distinguished Committee on a subject of great importance: The effect of, and appropriate legislative response to, the Supreme Court's decision in *Bailey* v. *United States*.[1]

Before the *Bailey* decision, the federal courts of appeals were generally in agreement that any use of a firearm to facilitate a violent or drug-trafficking crime would trigger the 5-year mandatory minimum sentence provided by 18 U.S.C. § 924(c), even if the defendant did not actively employ the firearm.[2] Thus, where a criminal actor's possession of a firearm emboldened him to commit the crime, or served to protect a cache of drugs or illegal proceeds, or was otherwise related in some meaningful sense to the commission of the crime, the courts quite properly held that § 924(c) had been violated.[3] As now-Justice Kennedy wrote in one such case:

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[1] 116 S. Ct. 501 (1995).

[2] *See, e.g., United States* v. *Hager*, 969 F.2d 883, 889 (10th Cir. 1992) ("the cases are unanimous in holding that a defendant can 'use' a firearm without firing, brandishing or displaying it"); *United States* v. *Featherson*, 949 F.2d 770, 776 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1698, 112 S. Ct. 1771, 113 S. Ct. 361 (1992); *United States* v. *Torres-Mediana*, 935 F.2d 1047, 1049 (9th Cir. 1991); *United States.* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989); *United States* v. *Meggett*, 875 F.2d 24, 29 2 (2d Cir.), *cert. denied*, 493 U.S. 858 (1989); *see also United States* v. *Plummer*, 964 F.2d 1251, 1255 (1st Cir. 1992); *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir.) (Thomas, J.) ("a defendant can 'use' a firearm without actively employing it"), *cert. denied*, 111 S. Ct. 365 (1990).

[3] *See, e.g., United States* v. *McFadden*, 13 F.3d 463, 465 (1st Cir. 1994) (hiding gun under mattress with money and in close proximity to drugs constituted "use"); *United States* v. *Castro-Lara*, 970 F.2d (1st Cir. 1992) (empty pistol in brief-case within locked trunk was "use[d]" during drug trafficking crime as it may have lent courage during transaction); *United States* v. *Hager*, 969 F.2d at 889 (pistol kept in boot in room where drug transactions occurred was used to protect the defendant and his cocaine); *United States* v. *Abreu*, 952 F.2d 1458, 1466 (1st Cir.

Continued

"If the firearm is within the possession or control of a person who commits an underlying crime * * *, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge occurred, then there is a violation of the statute."[4]

This reading of the statute was consistent with its text, which criminalizes all uses of a firearm during and in relation to a violent offense or drug crime, without regard to whether the use is "active" or passive."[5] Moreover, this interpretation of § 924(c) had the salutary effect of imposing stiff prison sentences on individuals who dramatically increase the risks to law enforcement officials, innocent bystanders, and others by using firearms to facilitate their illegal activities. Those individuals are precisely the types of dangerous felons who should be kept off the streets and in prison, and § 924(c) was instrumental in achieving that end.[6]

All of this changed as a result of the *Bailey* decision. In that case, the Supreme Court adopted the narrowest possible reading of § 924(c), holding that the phrase "uses * * * a firearm" requires "an active employment of the firearm by the defendant."[7] In the court's view, a drug dealer who "conceals a gun nearby to be at the ready for an imminent confrontation" or who otherwise keeps a gun "availab[le] for intimidation, attack, or defense" is not guilty of violating the statute,[8] even though that conduct creates the very dangers that the statute was intended to deter and punish.

A legislative response to the *Bailey* Court's unduly narrow reading of § 924(c) is necessary and appropriate. I understand that a number of alternative approaches have been proposed, and I would like to discuss each of them briefly.

First, S.B. 1945 would add to § 924(c) a clause imposing liability on any person who "has a firearm in close proximity to illegal drugs or drug proceeds, in close proximity at the time of his or her arrest, or in close proximity at the point of sale of illegal drugs." In my view, this proposal would probably solve most of the problems created by the *Bailey* decision, but it has some disadvantaged that militate against its adoption.

In particular, by limiting the scope of liability (except in the arrest situation) to drug offenses, S.B. 1945 takes an unduly narrow approach. While drug trafficking crimes make up the bulk of the cases affected by the *Bailey* decision, it is certainly possible to image scenarios in which a firearm could be used to facilitate the commission of a non-drug violent crime without being "actively employed" within the meaning of *Bailey*. For example, a defendant could stash a gun near the scene of a planned assault for use in case of need, or could keep firearms close at hand (but out of sight) in case a kidnapping victim attempted escape.

On the other hand, the references to possession of a firearm "in close proximity at the time of his or her arrest" may be somewhat overbroad. The scene of the ar-

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1992) (even though never fired, firearm kept to protect drug operation has been used within the meaning of the statute); *United States* v. *Featherson*, 949 F.2d at 776 (gun concealed under mattress could have been used to protect narcotics); *United States* v. *Hadfield*, 918 F.2d 987, 998 (1st Cir. 1990) (although firearm was not at the site of the drug transaction, its apparent purpose was to protect the drug transaction), *cert. denied*, 111 S. Ct. 2062 (1991); *United States* v. *Poole*, 878 F.2d at 1394 (concealed but accessible firearm was "used to protect [drug] house members and cocaine"); *United States* v. *Meggett*, 875 F.2d at 29 ("[p]ossession of a gun, even if it is concealed, constitutes 'use' if such possession * * * facilitates the commission of the offense"); *United States* v. *LaGuardia*, 774 F.2d 317, 321 (9th Cir. 1985) ("Section 924(c)(1) reaches the possession of a firearm which in any manner facilitates the execution of a felony").

[4] *United States* v. *Stewart*, 779 F.2d 538, 540 (8th Cir. 1985) (Kennedy, J.), *cert. denied*, 484 U.S. 867 (1987).

[5] This reading was also consistent with the congressional understanding of the scope of § 924(c). See S. Rep. No. 307, 97th Cong., 1st Sess. 890 (1981) ("the purpose of this section [924(c)] is to create a separate basis of criminal liability for the possession or employment of any firearm * * * in the commission of a crime because of the potential danger posed to human life by such conduct").

[6] In 1992, for example, 6,604 defendants were charged with firearms offenses (including § 924(c) violations) as a result of he Bush Administration's "project Triggerlock," a program specifically designed to use the mandatory minimum sentences provided by federal firearms laws to target and incarcerate the most dangerous and violent repeat offenders. SEe 1992 Annual Report of the Attorney General of the United States at 2; 1991 Annual Report of the Attorney General of the United States at 19. Unfortunately, firearms prosecutions have declined significantly under the Clinton Administration, but § 924(c) has still served an important function in deterring and punishing violent and potentially violent criminals. See 1995 Annual Report of the Attorney General at 21 (over 5,000 defendants charged with firearms offenses in 1995, down approximately 24 percent from 1992).

[7] 116 S. Ct. at 505 (emphasis original).

[8] Id. at 508.

rest is often far removed from the scene of the crime, and it is (at least arguably) overly harsh to enhance a defendant's punishment in such cases merely because of the fortuity that a firearm happens to be in close proximity at the time of the arrest.[9] Moreover, this amendment appears to create a statutory ambiguity, because it is not entirely clear whether the defendant's possession of the firearm at the time of the arrest would have to occur "during and in relation to" the underlying crime (and, if so, how that requirement could be met when the arrest occurs elsewhere).

The second proposed bill, S.B. 1612, would overrule *Bailey* by providing that any person who *possesses* a firearm during and in relation to a predicate offense is subject to liability under § 924(c). This proposed amendment eliminates the problems created by the *Bailey* decision, and does so in a manner that would be relatively simple for the courts to apply, because it is closely analogous to the approach that was already being followed by the federal courts prior to the Supreme Court's intervention.[10] Indeed, in adopting its narrow interpretation of § 924(c) in *Bailey,* the Supreme Court expressly relied on the fact that § 924(c) does not refer to "possession."[11] S.B. 1612 accepts the Supreme Court's implicit invitation to clarify the statute by inserting this term.

In addition, S.B. 1612 has other salutary aspects that should further commend it to the Committee. For example, by adding an introductory clause authorizing imposition of stiffer minimum sentences if required under other provisions of law, S.B. 1612 eliminates any potential conflict with other statutes. By increasing the mandatory minimum penalties for § 924(c) violations to 10 years for a first offense (and 25 years for a second offense), S.B. 1612 further advances the goal of ensuring that these dangerous offenders are incarcerated until they no longer pose a significant risk to society.[12] And by authorizing the death penalty for § 924(c) violations that result in death, S.B. 1612 substantially increases the statute's general and specific deterrent value and appropriately recognizes that criminals who take the lives of others should face the ultimate penalty.[13]

Finally, I understand that the Administration has proposed a narrower version of S.B. 1612 that would utilize the same response to the *Bailey* decision and would impose a 10-year mandatory minimum sentence on those individuals whose violation of § 924(c) is accompanied by the discharge of the firearm or the infliction of serious bodily injury. While adoption of this proposal would be a step in the right direction, it offers essentially nothing that is not already contained in S.B. 1612, and does not include the numerous other salutary provisions of S.B. 1612 that are discussed above. Accordingly, I believe that S.B. 1612 offers the best and most complete response to the *Bailey* decision and the problem of violent crime in general, and I urge the Committee to give that bill its favorable consideration.

Thank you, Mr. Chairman.

Senator DEWINE. Professor Zlotnick.

STATEMENT OF DAVID M. ZLOTNICK

Mr. ZLOTNICK. Thank you, Mr. Chairman, and thank you for the opportunity to address this committee. As you mentioned in my introduction, I did proudly serve as an assistant U.S. attorney here

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[9] Obviously, if the defendant also assaults law enforcement officers or otherwise commits a violent crime during his arrest, this concern would not apply, but in those circumstances the defendant would be independently liable under § 924(c).

[10] See cases cited *supra* notes 2–4. Adoption of this amendment would effectively overrule the few pre-*Bailey* cases that had applied a narrower interpretation of § 924(c). See, e.g., *United States* v. *Feliz-Cordero,* 859 F.2d 250, 254 (2d Cir. 1988) (holding incorrectly that there was no basis for a conviction under § 924(c) even though "a loaded gun was found [in a dresser drawer] in the same room as drug paraphernalia").

[11] 116 S. Ct. at 506 ("Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided."). Of course, it is not correct to say that S.B. 1612 would impose liability for "possession alone"; the defendant's possession must occur "during and in relation to" the predicate offense, thus ensuring that liability will not be imposed for mere possession of a firearm that is wholly unrelated to any criminal activity.

[12] Of course, § 924(c) achieves these results only to the extent that prosecutors actually use the statute in charging defendants. It would be unfortunate if this increase in the mandatory minimum sentence were to lead to an even steeper decline in the number of federal firearms prosecutions due to prosecutorial reluctance to charge under § 924(c). See supra note 6.

[13] I note that there may be some judicial confusion over the death penalty provision if it is adopted as currently phrased. The death penalty is made available "if the death of a person results." but it is unclear whether the death must result from the predicate offense, from the possession of the firearm, or both.

in Washington, DC, and I prosecuted many of these gun and drug cases in Federal court.

Also, in the past year I took a year absence from academia to study the effect of mandatory minimum penalties on the low-level and nonviolent drug offender, and as a result of that research had a lot of exposure to 924(c) cases. I feel I can bring this experience to this problem and offer you a balanced approach to what I see as the result of the *Bailey* case.

I think I would agree with all of the previous witnesses that the *Bailey* case did create a gap in Federal prosecution strategy, and I believe that gap is what you have called in your bill the close proximity case, or what others have called the paradigm of the drug fortress, which was mentioned in the hypotheticals of both you and Senator Biden.

But I think I would disagree with the previous witnesses about the best way to fix this narrow problem, and specifically I would disagree with using a possession standard as the way of remedying the statute. I believe that that would be incorrect because I do not believe it is consistent with the overall goal of 924(c), and let me briefly review that even from today's testimony.

Senator Biden said, I think the point of 924(c) is to punish those offenders in which a gun and a drug offense have a direct and an immediate nexus. Senator Helms referred to violent criminals who target innocent citizens or use the gun to further their offense.

I think the way I can best show you why the possession definition or standard would be incorrect is to focus on the opposite set of scenarios that the witnesses today, particularly Mr. Wilson, have picked the worst-case scenarios. I think in drafting the new bill, we need to look also at the least culpable offenders who may be sucked into this mandatory minimum, people who we probably did not want or conclude were these type of armed career criminals.

The best way I think I can do that for you, Mr. Chairman, is to give you a few small examples of pre-*Bailey* cases in which basically the possession standard was applied. Let me give you a few actual cases of individuals who were convicted under the statute before *Bailey*.

One case is Amy Kascor, and I have provided these all in written form and I would ask that they be appended to my statement at the conclusion.

Senator DEWINE. They will be a part of the record.

Mr. ZLOTNICK. Thank you, Mr. Chairman.

Ms. Kascor was a 21-year-old woman in Minnesota who was growing marijuana in her home. She received a 5-year sentence on the drug charge, but she also received an additional consecutive 5-year sentence under 924(c). There were four guns in the house; two were registered to her mother—legally registered handguns—who lived with her. The other two were hunting rifles owned by her boyfriend. No one contested that was the purpose of the gun.

Another case, also from Minnesota, is the *Helgesen* case, in which there was again a 5-year penalty for growing marijuana. It was a couple, and there was again no disagreement that the marijuana was being grown for medical purposes; that is, there were no accusations that the people were selling the marijuana or trafficking, but they had medical conditions under which they wanted to use

the marijuana. However, there were three unloaded guns in the home. They were the legal owners of the guns, and at sentencing the court noted that one of the two—in fact, the husband—was a minor player. Nevertheless, he received a total of a 10-year mandatory minimum sentence for this offense.

A case that I worked on and know quite a bit about is a methamphetamine case. I will move away from the marijuana. This individual was a night-shift worker at a factory for 17 years consecutively employed, but he developed an amphetamine habit to stay up during his night shift and when the legal drug became unavailable, he started trafficking—first using, and then trafficking in methamphetamine among his friends.

There was no question that he was guilty of an illegal act, but in the course of a year-and-a-half of an undercover investigation, with an informant who was a friend of the defendant and an undercover officer, no one ever saw a gun. No gun was ever used in any of these sales. This defendant participated in 14 small purchases amounting to no more than 10 grams at a shot. He received a 10-year sentence for the drugs, for the sales that he was involved in, but when the operation was ended, the police conducted a search on his home and found two or three registered handguns which he had owned previous to any of his drug-dealing and he received an additional 5-year enhancement.

Finally, I would bring to your attention the case of Arlen Angel, which was presided over by Paul Magnuson, who, I will point to you, Mr. Chairman, is a Reagan appointee and certainly someone with clear conservative and crime-fighting credentials. It was a marijuana case again. The fellow lived in a rural environment and the judge said mandatory minimums do not lead to justice in the culture of a State such as the State of Minnesota.

I know that a person in a farm house in Minnesota will have firearms in their home. Therefore, wrongdoings will automatically, if they are charged, result in the kind of additional mandatory minimum sentences that are imposed in a matter such as this one.

My point here, Mr. Chairman, is that if we go to a possession standard, we are talking about rural people living in Iowa, Wyoming—pick a place—who have guns in their homes that have nothing to do with the crime and they will be punished more severely than their counterparts who commit the same offenses in an urban environment.

So what I would counsel the committee to do, Mr. Chairman, is to think carefully before moving to a possession standard, particularly based on my studies that many of the people who will be swept into this are first-time offenders where there was no active use of a gun, where the guns were in the home. I would note that the original legislative history talks about—and Senator Biden referred to it—we want the criminal considering the Federal offense to leave his gun at home.

Many of these cases I have studied involve guns in the home. Many are unloaded, many were used for other purposes. Many of the guns were registered to persons other than the defendant. Often, they were locked away in a closet. I think that we have to recognize that if we want to fix the *Bailey* problem, which I think is an admirable goal, we need to do it in a way that does not pull

in these people. It is not just, and it is also an unnecessary drain on our resources which need to go to fight true violent crime.

Obviously, I have showed you a problem. I would like to suggest a solution. In the first place, I would suggest to the committee that we consider—other than amending the statute which provides for a mandatory minimum penalty, that we consider giving this problem to the U.S. Sentencing Commission to draft appropriate language in the sentencing guidelines to deal with the gun-enhancement problem.

Senator Hatch himself, in a recent article in a law review, suggested that perhaps we need to move away from mandatory minimum penalties, because they create these types of disparities, and send them over to the commission which can come up with a broader policy-based approach, yet still restrain judges from exercising the type of unrestrained discretion that led to the guidelines in the first place.

I would also refer the committee to the advice of Chief Justice Rehnquist, who in a 1993 speech pointed out the intended consequences of mandatory minimums are often harsh and result in things other than what were intended by the drafters, something obviously the committee has noted today.

Finally, in dealing with mandatory minimums, Mr. Chairman, I would note the remarks of Judge Easterbrook, again a judge whose conservative credentials cannot be questioned, who notes that mandatory minimum penalties often impact most severely on the low-level offender. Why is that? Because often it is the high-level or mid-level offender who has information to trade, and that is the basic way that offenders get out from under the mandatories is by cooperating. It is the low-level offenders without any useful information who more often than not bear the brunt of mandatory minimum penalties.

Having said that, I think it is obvious that I would also urge the committee not to increase the penalty and, if they are going to address this specific problem, try and focus the language in such a way that it deals with the drug fortress problem, which is where the *Bailey* decision seems to create a gap, and not move to the type of pure possession standard which will not only continue to sweep in the types of cases that I have mentioned to the committee, but also perhaps even broader ones. The committee should recognize that many of these individuals are swept into these cases not because of their own acts, but under the Pinkerton rules of conspiracy liability such that any act that is reasonable foreseeable by a co-conspirator will end up implicating them in the principal crime.

Thus, when we talk about the worst-case scenarios, we need to recognize the peripheral—the mules, the girl friends, the boy friends, the husbands, fathers, wives, or grandfathers, who have committed some minor part of the crime and then end up getting these enhanced penalties, which I do not believe is really the goal of the statute and really wise policy.

As I stated, I appreciate your willingness to allow me to submit these additional cases, along with a written summary of my testimony.

Senator DEWINE. They will be part of the record.

[The prepared statement of Mr. Zlotnick follows:]

PREPARED STATEMENT OF DAVID M. ZLOTNICK

Mr. Chairman and Distinguished Members of the Committee: Thank you for this opportunity to address the Committee on this issue. My name is David Zlotnick and I am currently an Associate Professor of Law at Roger Williams University School of Law in Bristol, Rhode Island. I previously served as an Assistant United States Attorney for the District of Columbia from 1989 through 1993 where I prosecuted drug and firearm cases in federal district court. This past year, I took a leave-of-absence from teaching to study and work on cases involving low-level drug and gun offenders sentenced to serve mandatory minimum terms. As a result, I have recently reviewed many § 924(c) cases that were decided both before and after the Bailey decision. Based on this recent work, as well as my previous federal prosecution experience, I believe I can offer the Committee a balanced insight into the potential consequences of the various pending bills to amend § 924(c).

While I am in general agreement with the witnesses who have testified today that the *Bailey* decision has created a statutory gap which should be addressed by legislation, I would like to take a different focus by examining the potential negative though unintended consequences of the language of several of these bills. Specifically, I will focus on the "possession" standard proposed by Administration and Senator Helms' bills.

The previous witnesses have each focussed on the types of culpable conduct that would be covered by the pending legislation. I respectfully suggest that these presentations have only presented half the challenge before the Committee. It is also crucial to consider the least culpable conduct that might also be swept into a too broadly drafted definition. This is particularly important, because as currently drafted, each bill maintains the current mandatory minimum structure which absolutely prevents a court from making exceptions in even the most deserving case. I believe that I can demonstrate to the Committee that the "possession" approach will in fact, create too many such marginal cases of technical guilt under § 924(c), and thus will criminalize conduct and offenders far afield from the focus of § 924(c) as articulated by Congress when first drafted and as repeated today by members of this Committee and other witnesses.

Initially, it bears repeating the typical criminal that this statute targets. The original sponsor of § 924(c)'s language, Rep. Poff, stated that the law was designed "to persuade the man who is tempted to commit a federal felony to leave his gun at home." 114 Cong. Rec. at 22231. See also *United States* v. *Anderson,* 59 F.3d 1323 (D.C. 1993). Senator Biden today repeated this point as a main goal of the legislation. Even more forcefully, Senator Helms today articulated that the law is directed against "violent criminals who target innocent civilians" and use firearms "to further their crimes."

Therefore, we should test these stated goals against the potential reach of the "possession" approach favored in several of the pending bills. Note first that a "possession" standard would essentially return the state of the law at least as broad a reach as existed before the *Bailey* decision. Therefore, I would like to examine the facts of several individual cases from the pre-*Bailey* period, which along with a larger set that I have submitted to the Committee, involve conduct far removed from the paradigm of the violent drug trafficker leaving his home armed and ready to commit violence in the course of his drug activities. Instead, these cases demonstrate that there is a significant class of defendants and cases that have been, and will again, be unintentionally penalized by 924(c) if the statute is amended to a "possession" standard.

For example, consider the case of Amy Marie Kascor, a twenty-one year old woman convicted of growing marijuana in her garden at home. She received a five year sentence for cultivation and an additional five years under § 924(c) for several firearms that were found in the home, two handguns which were registered to her mother and two hunting rifles which were owned by her boyfriend. While there was no indication that Ms. Kascor was involved in any drug transactions in the home, or ever used or carried these firearms during her cultivation activities, her constructive possession was sufficiently established by her presence in the house and access to the weapons. Ms. Kascor was pregnant when arrested and gave birth while incarcerated. Michigan District Court Judge Stewart Newblatt, who was obligated to impose ten years incarceration, called it a "vicious sentence."

Or consider the cases of Glenn Suess and Ruth Helgesen from the federal District Court in Minnesota. These defendants were growing marijuana in their home for medical purposes including treatment of chronic pain. A search of their home revealed three unloaded weapons which were legally registered to Mr. Suess, who was characterized as having only a minor role in growing the marijuana. These defendants lived in a rural area where guns were commonplace. They had rebuilt their

home, tried to live off the land, even without electricity for a time. At sentencing, Judge Alsop, a Nixon appointee, noted that these ten year sentences were a "classic case of why we shouldn't have mandatory minimum sentences."

In a similar case in the same District, Judge Paul Manguson, a Reagan appointee, also noted the unfairness of applying a "possession" standard to drug cases in rural homes. He stated that—

"Consecutive, minimum mandatory sentences for guns do not lead to justice in the culture of a state such as the state of Minnesota. * * * I do know that a person in a farm house in southern Minnesota will have firearms in the home. * * * Therefore, the wrongdoings will automatically if they are charged, result in the kind of additional minimum mandatory sentences that are imposed in a matter such as this." (*United States* v. *Angell,* Cr. No. 3–91–138 (D. Minn.) (August 28, 1994, Sent. Tr. at 4.)

Finally, even taking a drug considered more dangerous than marijuana such as methamphetamine, I ask the Committee to consider the case of David Bridwell from the Western District of Missouri. Mr. Bridwell worked on the night shift at a factory for seventeen continuous years up until his arrest. Due to the hours he worked, he began to rely on amphetamine and then methamphetamine to stay awake. Later, he began to sell the drug to a circle of his friends and coworkers to support his own habit. Over the course of a year and one half, an undercover officer who was introduced into this circle made fourteen small buys from Mr. Bridwell. When the ring was busted and search warrants executed on the homes, a small amount of methamphetamine was found in Bridwell's home along with several licensed guns, which he had purchased long before his drug dealing began. Although the defendant was never seen with a gun during any of the transactions, Mr. Bridwell, a first time of finder, received ten years for the drugs (based on the amount in the entire conspiracy) and an additional five years for the guns.

From these examples and the other summaries I have submitted, it is first clear that the facts of these cases have nothing in common with the stated purpose of the bill—to persuade traffickers to "leave their guns at home." In fact, 924(c) sentences are regularly being imposed on defendants based on firearms they legally possessed in their own homes.

Second, although the statute has a "during and relation to the drug offense" requirement, both the pre-Bailey "passive use" and the proposed possession definition are broad enough to encompass simply having a gun and drugs in a home during the period of an offense. Thus, 924(c) sentences have been and will be based on firearms that are unloaded, lawfully registered (often to uninvolved family members), are found in a different room from the drugs, or are weapons such as hunting rifles that are not typical of drug traffickers. Furthermore, because of the reach of conspiracy laws, minor non-violent offenders can also be held liable for the foreseeable acts of their coconspirators. Thus, a girlfriend can be convicted of 924(c) for the mere possession of a unloaded gun by her boyfriend during the offense if at any time during the length of the conspiracy or the offense, she aided and abetted his activities in even a minor way. While perhaps proper exercise of prosecutorial discretion would prevent such cases from being brought, the testaments of the judges noted above, as well as other judges whose conservative credentials also cannot be challenged, are proof that these cases are being routinely brought by prosecutors.

Third, these examples demonstrate that a broad possession standard conflicts with the extent of lawful gun possession, especially in rural communities. In essence, rural defendants who commit exactly the same crime as their counterparts in the city, but have a gun in their house, will likely receive additional mandatory time for the same exact crime. Thus, while the statute may be aimed at the savvy, violent urban street gang member who places his weapon by his drugs, rather than carry it on his person, the effect is discrimination against defendants in rural states.

Fourth, not only are these cases troubling in that the relation of the gun to crime is tenuous, but many of these defendants are also first-time offenders whose offenses did not actually involve any violence or threat of violence, particularly noting the rural marijuana cultivation cases. Thus, one needs to question whether these are the defendants who are truly in need of additional mandatory time and if the taxpayer should be asked to foot the $22,000 or more per year for their incarceration. Make no mistake about it, in each of these examples, the defendants were convicted of drug offenses for that resulted in substantial prison terms of at least five years each. Thus, the question for this Committee is not whether these individuals should be punished but whether additional mandatory sentences based on a tenuous connection to a firearm are just, rational or cost-effective.

Lastly, part of the legislative calculus in writing broad or narrow language for § 924(c) in light of *Bailey* is to consider the breadth of the statutory gap created by the decision. In this area too, I suggest careful analysis reveals that the *Bailey* deci-

sion has had less dire consequences than have been suggested. I believe that the statutory gap created by *Bailey* is limited to a narrow class of what have colloquially been referred to as "drug fortress" cases. In the typical "drug fortress" case, a drug trafficker places a loaded weapon in an easily accessible location and in close proximity to a drug stash or to the location of prospective drug transaction. The weapon is intended to be used in the event that a rival attempts to rob the trafficker, or to enforce or dictate the terms of a drug transaction by threat of violence. Furthermore, even in "drug fortress" cases, the impact of *Bailey* has likely been overstated. *Bailey* only prevents the application of § 926(c) to "drug fortresses" cases where the government has no other testimony or evidence that this trafficker at any point in the offense, actively used, displayed, carried or even referred to a firearm. In the typical federal case that is the result of a long-term investigation, replete with undercover officers, informants and video and audio surveillance, such evidence is usually available if this defendant is a true armed trafficker. Thus, the only "drug fortress" case that are likely to fall through the *Bailey* gap typically arise from a local police department search warrant that was based on very limited pre-warrant and post-warrant investigation. While these cases are not typical of federally initiated investigations, they are none the less plentiful on district court dockets as local police bring what is really only local drug activity into federal court, due to the limited quantities of narcotics that trigger the five year mandatory minimum penalty. Not only are these cases of minimal value to the primary federal enforcement goal of prosecuting major drug trafficking, they are also the type of cases that present the greatest danger that a minimal and non-violent offender who is already subject to a significant drug sentence, will unfairly receive an even greater sentence based on limited investigation and evidence. Therefore, in drafting of the statute's new language, the Committee should not be driven by the least important and most troubling type of case but instead should be satisfied if the new language ensures that the main targets of the statute do not escape. A contrary strategy will only continue to clog the federal courts with case better addressed in state court and might even encourage police to terminate their investigations early by providing too easy access to enhanced sentences.

Based on my comments this far, it is obvious that I believe the bills sponsored by the Administration and Senator Helms are unwise because they propose a possession standard. Furthermore, given the injustices that would occur under a possession regime, increasing the penalty to ten years as Senator Helms suggests would be to doubly compound these tragic cases. As an alternative I have two suggestions for the committee.

Initially, I urge the Committee to close the *Bailey* gap in the context of delegating implementation of the policy objectives of 924(c) to the United States Sentencing Commission as alternative to the current mandatory minimum sentencing regime. The cases I have presented here amply demonstrate Chief Justice Rehnquist's oft quoted point that, "[t]hese mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders. Remarks of Chief Justice William H. Rehnquist at the National Symposium on Drugs and Violence in America, June 18, 1993 at 6.[1] Furthermore, while the Chief Justice and others have correctly noted the problems with mandatory minimums in general,[2] this type of sentencing regime is particularly troublesome in the gun and drug context for several additional reasons. As Judge Frank Easterbrook has noted, many mid- and high-level drug traffickers escape their mandatory minimum sentences by cooperating with the government which then files a motion to waive the mandatory sentence otherwise applicable; in fact Judge Easterbrook writes, "[t]he more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor." *United States* v. *Brigham,* 977 F.2d 317 (7th Cir. 1992). On the other hand, less culpable drug and gun offenders often have little to trade on and therefore get stuck with the mandatory term. Judge Easterbrook calls this result "sentencing inversion," which metes out the "harshest penalties to those least culpable . . ." Id. Furthermore, possessory type offenses, such as the Committee is considering for 924(c) are the worst subjects for mandatory sentences given the broad legal definitions of "constructive possession" and "dominion and control." To

[1] The Chief Justice also noted that the impact of mandatory minimums and the "war on drugs" has been the growing federalization of crime. Id at 3, 6.

[2] *See* David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," CATO Institute Policy Analysis May 17, 1994.

the extent mandatory minimums are useful, they are best suited to specific intent crimes such as first degree murder or assault with intent to maim.

The Sentencing Commission on the other hand, is well suited to implement a policy of enhanced sentences for use and/or possession of firearms during drug and other violent offenses. Even now, the Guidelines include numerous provisions for increasing the offense levels for gun possession during drug and violent crimes. *See* U.S.S.G. §§ 2A2.2(b)(2), 2D1.1(b)(1). Furthermore, Congress has repeatedly in recent years directed the Commission to implement similar policies through amendments to 28 U.S.C. § 994. *See* § 994(h)(I)(j)(k). Senator Hatch, Chairman of this Committee has himself recently endorsed the concept of moving from mandatory minimum statutes to a combined approach that uses specific and general statutory directives to the Commission and increased statutory maximums. The Honorable Orrin G. Hatch, "The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System," 28 Wake Forest. L. Rev. 185 (1993). In light of the views of these respected jurists and legislators, I invite the Committee to consider this route as a means of rationalizing the legislative response to the problem of drugs and guns.

Alternatively, if the Committee is not able to address this larger issue at this time, I would suggest that more limiting language be used that reaches the "drug fortress" but does not unwittingly sweep in the unarmed drug trafficker or cultivator who also has firearms in the home. Various limiting language that could be added includes; "close proximity to narcotics or drug sale, "readily accessible," "operable," and "unregistered." Such language would address the gap created by the Bailey decision without the unfortunate side effect that the broader "possession" language would allow.

I thank the Committee again for allowing me this opportunity and request permission to submit a set of brief summaries of actual cases that demonstrate some of the points I have discussed along with my written statement.

Families Against Mandatory Minimums Foundation

AMY MARIE KACSOR

Federal sentence: 10 years.

Convictions: conspiracy to manufacture marijuana; use of a firearm during a drug transaction.

Priors: None.

Date of sentencing: 1994.

Date of birth: 1976.

Nature of Offense: At 21 years old, Amy was growing marijuana for personal use in a garden at her home in Owosso, Michigan. She shared the house with her mother who owned two registered handguns, and her boyfriend who owned some hunting rifles.

Guideline Sentence: Amy, her mother and her boyfriend were all charged with the same crime. Amy pled guilty to conspiracy to manufacture marijuana and use of a firearm during a drug trafficking offense in exchange for charges against her mother being dropped. Without the mandatory minimum for the gun conviction, Amy's guideline sentence for the drugs and gun would have been 78 months (5 years for the drugs and 2 points for the gun=level 28). In addition to the prison sentence, the government seized the house that was purchased by Amy and her mother with funds from her father's life insurance, and they seized the family car which was purchased by her grandmother.

District Judge: Stuart Newblatt, who called this a "vicious sentence."

Personal Background: Amy was 6 months pregnant at the time of arrest. After her incarceration she gave birth to a daughter who her mother is raising.

Attorney: Scott Keillor.

GLENN SUESS AND RUTH HELGESEN

Federal sentence: 5 years each.

Conviction: Use of a weapon during a drug trafficking offense (manufacture of marijuana).

Priors: None.

Date of sentencing: May 15, 1992.

Age of defendants: Glenn, 51 years old; Ruth, 39 years old.

Nature of Offense: This case began as a state case after a sheriff with a grudge against Glenn sent a SWAT team into Glenn's property and arrested Glenn and Ruth after seizing approximately 5 pounds of toothpick-size marijuana plants, de-

stroying most of their property in the process. After being charged with possession of 100 kilograms of marijuana, Glenn and Ruth eventually succeeded in getting the charges dismissed on the grounds of an illegal search. Coincidentally or not, the feds and the national guard soon raided their property with several armed agents and helicopters, and arrested Glenn and Ruth for the same crime. During the federal search of Glenn and Ruth's home, the DEA found three unloaded, legal weapons. Neither Glenn nor Ruth sold or distributed marijuana; rather, both grew their own marijuana for personal medicinal reasons, Glenn on doctor's advice for treating hyperactivity and chronic pain and Ruth to relieve acute chronic pain from ruptured discs as well as asthma. Glenn was the legal owner of the weapons and of the property where the drugs were being grown. He was also the primary caretaker of the marijuana plants, with Ruth playing what Glenn characterized as only a "minor" role in growing the pot.

Sentence: Glenn and Ruth pled out of the drug charges, and pled guilty to the use of a firearm in relation to a drug trafficking crime on the advice of their attorney.

District Judge: Judge Donald D. Alsop, of the U.S. District Court for the District of Minnesota, a Nixon appointee, stated at sentencing, "Well, I agree with [defense counsel] that this is a classic case of why we shouldn't have mandatory minimum sentences. His [Glenn's] isn't quite as bad, but the one coming up [Ruth's] is even worse. I wish you had heard the speeches I have given most recently at the Minnesota Club about my view of mandatory minimums."

Personal Background: Glenn and Ruth lived in a home in rural northern Minnesota, where guns were commonplace. They had rebuilt their house, lived off the land, and, until very recently, did not have electricity. Glenn has a 15 year old daughter who was sent to live with an aunt after Glenn's arrest.

Attorney: Glenn's, Earl Gray.

DAVID A. BRIDWELL

Case Summary—David Bridwell is a 46 year-old, first-time offender serving a fifteen year federal sentence. Despite the fact that he was predominately a drug user rather than a dealer and that he had productively worked for the same company for over 20 years, the mandatory minimum statutes gave the district court judge no discretion to impose a lower sentence. One component of Bridwell's sentence is a five year mandatory sentence for using a firearm in connection with a drug offense. Under the interpretation of this statute at the time of his plea, Bridwell could be found guilty of this offense even though the guns in his home were lawfully registered and it was undisputed that he never carried, displayed or otherwise employed any firearm during a drug transaction.

Pro Bono Assistance Needed—Bridwell needs an attorney to prepare a federal habeas petition under 18 U.S.C. § 2255. Under a recent Supreme Court case, *Bailey* v. *United States,* 116 S.Ct. 501 (1995), he appears to have a strong claim to vacate to the gun charge and reduce his sentence by five years. This part of the case would be an excellent project for a junior associate because the claim is strong and FAMM has substantial materials and research to assist the attorney. Cases applying *Bailey* are being reported weekly and this is a good opportunity to see doctrine in development.

Bridwell must also bring any other claims he currently has in this motion, therefore the assigned attorney must also investigate two other potential issues. There may be grounds for a resentencing based on the failure of the government to prove the type of methamphetamine in the case and because the government aggregated a series of small buys over a long period to increase his sentence. These are also "hot" issues in the federal courts, but there is sufficient existing case law to make the project appropriate for a junior level attorney. The FAMM Litigation Director is available to supervise the research and drafting of the motion.

Defendant Profile—Bridwell was born and raised by his mother in Springfield, MO. After graduation from high school in 1968, he immediately got married and began working on an assembly line. After this company left town, he had a number of jobs until 1971, when his mother assisted him in obtaining a position with her employer, the Sweetheart Cup Company. He worked the night shift at Sweetheart Cup until his arrest. Bridwell has been married several times and he has two adult children. Since 1986, he has lived with Annette Mallone, a codefendant in this case who received a five year sentence. Bridwell's mother, Mary Mace, has been very supportive and is the original contact for this case.

Offense Profile—Bridwell began using diet pills to help him stay alert during his night shift work at the cup factory. When he was unable to obtain these drugs legally, he began buying methamphetamine from, and eventually selling to, his co-

workers and friends. Later, Bridwell began to buy and resell ounce quantities to a somewhat larger circle of people. One of his regular customers became an informant and introduced an undercover officer to Bridwell. Over the course of a year and a half period in 1991 and 1992, the officer and the informant made 14 small buys from Bridwell, for a total of only 157 grams of methamphetamine.

In December, the police concluded their investigation with arrests of the participants and searches of their homes. In Bridwell's house, they found one-half an ounce of methamphetamine, consistent with the small quantities he claims was the extent of his dealing. The police also seized numerous legally registered firearms and charged Bridwell with using these firearms in relation to his drug business although there was never any evidence that Bridwell carried a gun or otherwise used his firearms in connection with any drug sales.

Bridwell pled guilty to conspiracy to distribute methamphetamine and using a firearm in connection with a drug trafficking offense. He pled guilty to these offenses, although at sentencing, he only admitted to the guns being in the same house as the drugs. As part of the plea, he agreed that the conspiracy had been involved in one to three kilos, although he only personally sold a fraction of that amount. However, under the Sentencing Guidelines, he was held responsible for the entire amount and sentenced to 10 years for the drugs and a consecutive five years for the gun charge. Bridwell claims he sold to support his own drug use and never made any money from trafficking. Nevertheless, after his incarceration, the government forfeited his home which he had owned for 18 years.

MICHAEL CLEMONS

Case Summary—Clemons is a first-time offender serving a ten-year federal sentence for conspiracy to distribute marijuana and using a firearm in connection with a drug trafficking offense. On the gun charge, the government did not contend that Clemons actively used any of the weapons in his home in connection with this offense nor did they deny that Clemons was running a legitimate gun repair business. Nevertheless, the government insisted Clemons plead guilty to the charge. The acknowledged owner of the marijuana, and the clearly more culpable offender, received only a five year sentence because he did not own any of the firearms and he agreed to testify against Clemons if he went to trial.

Pro Bono Assistance Needed—Clemons needs an attorney to prepare a federal habeas petition under 18 U.S.C. § 2255. Under a recent Supreme Court case, *Bailey* v. *United States,* 116 S.Ct. 501 (1995), he appears to have a strong claim to vacate the gun charge and reduce his sentence by five years. This part of the case would be an excellent project for a summer associate or junior associate because the claim is strong and FAMM has substantial materials and research to assist the attorney. Cases applying *Bailey* are being reported weekly and this is a good opportunity to see doctrine in development.

Clemons must also bring any other claims he currently has in this motion, therefore the assigned attorney must also investigate any other potential claims. However, our initial reviews suggests that the *Bailey* issue may be the only grounds for relief in this case. While FAMM would prefer that a more senior litigator be involved as well, the FAMM Litigation Director would be available to supervise the research and drafting of the motion.

Defendant Profile—Clemons is a 40 year-old first-time offender. His father died in an accident shortly after he was born. He left high school in ninth grade to go to work following his mother's heart attack. Clemons was gainfully employed from 1974 until 1979 as a general laborer and from 1980 to 1990 as a machine operator. From 1993 until this offense he was unemployed as the result of a herniated disk. Clemons has been married once and has four minor children who live with his ex-wife, with whom he is on good terms. Clemons' live-in girlfriend was also arrested but charges against her were later dropped. She is the original contact on this case and she continues to be supportive while he is incarcerated.

Offense Profile—Clemons enjoys working on guns and made a hobby and part-time living repairing guns since his back injury. As a result, his home in rural Ohio was literally filled with firearms. Clemons also smoked marijuana ranging from infrequent to daily use. His former brother-in-law, Dave Lambert, was a local marijuana dealer with a criminal record. At Lambert's request, Clemons allowed him to store approximately 500 pounds of marijuana at Clemons' home. An undercover buy operation revealed this stash location to the police who obtained a search warrant that led to Clemons' arrest.

HERMAN MCGEE

Federal sentence: 45 years.

Conviction: Conspiracy to distribute cocaine; use of firearms during a drug transaction.

Priors: None.

Date of sentencing: July 19, 1991.

Date of birth: 1950.

Nature of Offense: Herman was convicted on the word of a single informant, Mike Barnes, who had been arrested 6 months earlier. At the time of Barne's arrest, he gave them the name of his supplier, and it was not Herman McGee. But six months later Barnes was told that he was running out of time and that he must give them someone else so he gave them Herman's name. The evidence presented against Herman at trial was a tape recording between one of his codefendants and Barnes talking about Herman. When Herman was arrested, they seized five legally owned guns from his collection at home. No drugs, or drug paraphanalia, were found at his home or in his possession.

Guideline Sentence: No amount of cocaine was specified in Herman's indictment, but Barnes estimated the amount to be 93 kilos, which determined Herman's 20 year sentence (level 38). Herman received 25 years for the 5 guns found in his home, although no one testified that any drug transactions occurred in his home. In addition to the prison sentence, the government seized Herman's wife's jewelry, two vehicles, and some rental property that he owned. The informant, Mike Barnes, was paid and received immunity.

Case Status: Herman filed a 2255 motion for resentencing after the Supreme Court *Bailey* decision and it was granted. He had 25 years dropped from his sentence for the gun convictions, and he is serving the remainder of his 20 year drug conviction.

District Judge: William Hungate of Missouri.

Personal Background: Herman has been married for over 20 years and has a 16 year old daughter. He was employed at Chrysler for 18 years until his arrest, and his wife has worked there for over 20 years. Herman had supported himself since his mother died when he was 16 years old.

Lawyer: Richard Sindel.

TRACY AND DENNIS WILCOX

Federal sentence: 6 years, 4 months.

Conviction: conspiracy to distribute marijuana; use of firearms during a drug transaction.

Priors: None.

Date of sentence: August 5, 1994.

Date of births: Tracy July 28, 1968; Dennis, 1958.

Nature of Offense: Tracy and Dennis were using marijuana and had 38 kilograms of it at their house when they were arrested. A government informant turned them in. A search of their house found 13 hunting guns, all legally owned, and unloaded. None of the guns was near the marijuana and there was no evidence that they had used or carried the guns in drug transactions.

Sentences: Tracy and Dennis pleaded guilty to the marijuana charge and went to trial on the gun charges. They lost at trial and lost their appeals. Their guideline sentence was level 14 (15–21 months) plus 5 years for the gun conviction bringing them to level 26 (63–78 months). The judge sentenced them each to 76 months. In addition to the prison sentences, Tracy's house was seized.

Case Status: Tracy and Dennis filed successful 2255 motions under the Supreme Court *Bailey* decision and have served their sentences for the drug conviction.

Distict Judge: Michael Melloy, 8th Circuit Court in Iowa. He was appointed by President Bush.

Personal Background: Tracy and Dennis were raised in the country, hunting and fishing, and they liked to target shoot. Dennis has a 16 year old daughter who was living with them when they were arrested. She returned to her mother's house after the arrest.

Attorney's: Dennis' attorney is Wallace Taylor. Tracy's attorney is Frank Nidey.

DAVID CANTERBURY

Federal sentence: 5 years, 9 months.

Conviction: Possession of a firearm in relation to a drug trafficking offense; conspiracy to possess and distribute cocaine and possession of illegal drugs.

Priors: Adjudicated charge of possession of 1.5 grams cocaine 1989.

Date of sentencing: May 9, 1994.

Date of birth: February 23, 1960.

Nature of Offense: David was a small-time drug user who sold 3.5 grams of cocaine to undercover agents who befriended his girlfriend. After the sale, agents raided the farm house where he lived in rural Iowa, and found 4.84 grams of cocaine and 72 grams of marijuana. They also found a 9 mm rifle under his desk and a 9 mm handgun in the head board of the master bed. David used the rifle for hunting on his farm and the handgun for general protection.

Guideline Sentence: In a plea agreement, prosecutors dropped one of the gun charges an convicted David on the rifle charge and the drug possession and distribution. He received 60 months for the gun and 9 months for conspiracy to distribute cocaine. Were it not for the mandatory minimum sentence required for the gun conviction, David would have served between 24 and 30 months (base offense level 18 for the cocaine, plus 2 for the weapon, minus 3 for the acceptance of responsibility=total offense level of 17).

Case Status: David filed a 2255 motion under the Bailey Supreme Court decision and was granted a new sentence of 28 months. After completion of the sentence (with good time) he was released on May 15, 1996.

District Judge: Donald E. O'Brien, Chief Judge, 8th Circuit, N.D. of Iowa.

Personal Background: David was farming his family farm with his father at the time of his arrest and conviction. He has now returned to farming.

Attorney: Mark Meyer.

BRENT HARVEY

Federal sentence: 68 months.

Conviction: possession with intent to distribute marijuana; use of a weapon during a drug trafficking crime.

Priors: None.

Date of sentence: March 15, 1993.

Date of birth: June 8, 1960.

Nature of Offense: Brent's conviction for possession of 4.5 kilograms of marijuana resulted from a confidential informant telling police that Brent was a drug dealer. Police found the marijuana inside Brent's home, and the 4.5 kilo amount led to an offense level of 10, which dictates a sentence of 6–12 months. However, the police found a rifle and a handgun under Brent's bed. Both guns were inside of gun cases and unloaded, although ammunition was found near them under the bed. Brent owned both these guns legally, and had them properly registered. Because the jury found Brent guilty on the gun charge, the judge was required to sentence Brent to an additional 5 year mandatory minimum in federal prison.

Guideline Sentence: Brent's offense without mandatory minimums would have been a level 12, carrying a 10 to 16 month sentence.

Case Status: Brent filed a successful 2255 motion after the Supreme Court *Bailey* decision and was released in the Spring of 1996.

District Judge: George C. Young, Middle District of Florida. During the proceeding, the judge said, "I am concerned about this gun count where the guns are found in the home where guns can ordinarily be possessed by an individual for the protection of the home, and it's illegal to have the use of a gun in a trafficking offense. I think that the obvious intention of the Congress in passing such a law was to penalize severely the use of a gun in connection with the active trafficking; that is, whether you are transferring marijuana or other narcotics, and having the gun available to utilize. But here, there is no evidence that this marijuana was being sold in the home, that I recall. And a gun under the bed that you had to be lying down to reach. I am concerned about that. We are talking abut a mandatory five year sentence, and I'd like to have something on that."

Personal Background: Brent is married and has one child, who is almost one year old. Before his incarceration, Brent worked full-time at his father's used car lot.

Attorney: James Campbell.

NRA

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

The United States of America,

Plaintiff,

-v- Criminal No. 3-91-138 (1 & 2)

Arlen Floyd Angell,

Defendant.

TRANSCRIPT OF SENTENCING PROCEEDINGS

BEFORE THE HONORABLE PAUL A. MAGNUSON

St. Paul, Minnesota

August 23, 1994

Reagan appointee

APPEARANCES:

For the Plaintiff: Margaret Burns-Magill

For the Defendant: Earl Gray

(Defendant present.)

Official Court Reporter: Jeanne M. Anderson

JEANNE M. ANDERSON, RPR-CM * * (612) 222-4188

Thursday afternoon,
August 23, 1994
1:30 o'clock, p.m.

THE COURT: Good afternoon. We have the matter of United States versus Angell. We are here because the Circuit Court of Appeals has instructed me on the errors of my ways. I walked in the courtroom and told my staff as I was walking in here, I am here on the singlely most distasteful thing I ever had to do since I started in my job; but, I am here.

It strikes me that based on the calculations that are provided by the Circuit Court of Appeals, that the Total Offense Level now becomes 24, the Criminal History Score I, and the guideline range is 51 to 63 months on the base offense, plus the continuing consecutive 60 months.

Are there objections to these findings?

MR. GRAY: Your Honor, since he was sentenced, the acceptance of responsibility is now three points. And it would seem to me he would get the benefit of that because his sentence is more than -- I forgot the amount. So, it would b a three-point acceptance which would bring him to a category 24, a 46 to 57 month range. Category 23, I'm sorry, which would be 46 to 57 months.

MS. BURNS-MAGILL: Your Honor, if I may, the government would object to giving Mr. Angell the third point for acceptance of responsibility. The guidelines are clear

THE COURT: Any comments on behalf of the government?

MS. BURNS-MAGILL: No, Your Honor.

THE COURT: Mr. Angell, I am kind of repeating something here, but I need to do it.

I have said it before, and I will say again, drug dealin is not right, it is wrong. You were wrong in getting involve in this marijuana business. I have no difficulty with that.

It's a case that I speak, by my comments today, to my congressman, to the legislative branch of government. There are a number of things in this case that have bothered me deeply from the first day I saw it. They have not changed. Consecutive, minimum mandatory sentences for guns do not lead to justice in the culture of a state such as the state of Minnesota. If I had my choice there would be no handguns, they would be confiscated; but I don't write those laws. But, I do know that a person in a farm house in southern Minnesota will have firearms in the home. I grew up in one. Not in southern Minnesota, but it is a comparable situation. It will exist. Therefore, the wrongdoings will automatically if they are charged, result in the kind of additional minimum mandatory sentences that are imposed in a matter such as this.

The second aspect of this case that hurts me to the very quick, and again it is not your conduct necessarily, Mr.

1 Angell, because I can repeat that it is wrong; but, this is a
2 case in which the evidence obtained in the case was obtained
3 within a matter of hours of the original stop on that
4 ill-faded night. It is a matter of a case that sat, then, for
5 nearly a year before there was an indictment handed down. And
6 I suspect strongly that it was a year of great debate between
7 police officers as to whether or not there should be a charge
8 in the federal court or a charge in the state court, a charge
9 in the state court that would constitute a petty misdemeanor,
10 a charge in the federal court, or one that approaches about
11 nine years of incarceration. A charge in which a person that
12 had no criminal history now stands before this Court. And I
13 cannot help but reflect as I sat beside the former director of
14 the Federal Bureau of Prisons and listened to the Chairman of
15 the United States Sentencing Commission speak with such great
16 confidence about a ten-year sentence to be imposed upon a
17 certain given situation. And the director of the Federal
18 Bureau of Prisons leaned over to me and said: Does the
19 chairman not realize that any person that spends ten years in
20 one of my institutions comes out of that institution
21 dysfunctional, without exception? A society that is today
22 debating a crime bill repeat with that kind of long, long
23 sentences imposed.
24 And finally, I come to another item that hurts me to the
25 very quick. I carry no pretense of the awesome

1 responsibilities of imposition of sentencing and deprivation
2 of freedom of people. It is a fearful responsibility. It is
3 the only aspect of my job that has ever caused me to lose
4 sleep.
5 Society has chosen instead to place the responsibility
6 for the amount of sentence that people receive out of the
7 hands of judges and into the hands of prosecutors and into the
8 hands of police officers, where pre-determined sentences are
9 created time after time. And so, I can hear the debate that
10 occurred those many, many months ago as to whether, Mr.
11 Angell, you should be charged in the federal court or you
12 should be charged in the state court. And so it is that I
13 become offended with the struggle that one is imposed upon to
14 deliver.
15 I say by the same token that so long ago I raised my hand
16 in the well of this courtroom and said that I would uphold the
17 laws of this nation. When I do that, I have no choice but to
18 uphold those laws of this nation or remove myself from this
19 position.
20 At this point, I continue to make the choice to remain in
21 the position. But, I do not say that the sentence that I am
22 compelled to impose upon you today, Mr. Angell, is a personal
23 choice. It is not the sentence that you would receive had the
24 Court had the opportunity to exercise discretion, background
25 and judgment that is classically thought to be placed in the

1 hands of a Judge but has been removed. And so I ask those in
2 the legislative branch to give serious consideration to that
3 responsibility that has been delegated and where that
4 delegation rests.
5 Nevertheless, based upon these comments and pursuant to
6 the Sentencing Reform Act and pursuant to the direction of the
7 Court of Appeals of the Eighth Circuit, the Court hereby
8 imposes as to counts of conviction, other than the gun count,
9 a consecutive sentence of 46 months of imprisonment, to be
10 followed by a 60-month consecutive sentence for the gun count
11 for which you stand convicted. All other terms and conditions
12 of the previously imposed sentence, including supervised
13 release, et cetera, all remain in in effect. Thank you.
14 MR. GRAY: Your Honor, with respect to release to a
15 halfway house, I have been advised by some actually jailhouse
16 lawyers in the federal system that it is important now to
17 request early release to a halfway house. I guess it means
18 the difference between 90 days and six months. I know it is
19 down the path a long ways, but I would request at this time
20 that he receive a recommendation of early release to a halfway
21 house
22 THE COURT: I will give that recommendation for an
23 early release to the halfway house. I might as well -- I have
24 been on the soapbox today, I will get back on it. I give it,
25 Mr. Angell, only because I believe the sentence that is

1 imposed on you and has been compelled by this Court is an
2 unfair sentence. But, be that as it may, I also want you to
3 know that I in fact personally oppose long stays in halfway
4 houses. I think it is an unnatural existence. Six months in
5 a halfway house is almost an intolerable existence because you
6 are placed under exceedingly stiff rules that you can't
7 violate, and you have to do it for such a long time. And I
8 don't know that anybody present in the courtroom -- but I have
9 a war story about, that some poor chap that got in the halfway
10 house for a long period of time, it came to his birthday. He
11 went out and had a couple of beers which he wasn't supposed to
12 do. But, nevertheless, he came back to the halfway house and
13 pulled into the parking lot and fell asleep in the parking
14 lot, instead of in his bed and ended up having to go back to
15 prison to finish his term. That is the unfortunate part about
16 halfway houses. But, be that as it may, because of the
17 situation of this sentencing, I do make that recommendation.
18 MR. GRAY: Thanks, Judge.
19 THE COURT: Okay, thank you.
20 MS. BURNS-MAGILL: Thank you.
21
22
23
24 Certified by: _____
Jeanne M. Anderson, RPR-CM
Official Court Reporter
25

Senator DEWINE. Professor, let me just start with you, since this is where we are ending. Could you tell me, under the Sentencing Guidelines today, how drugs are dealt with?

Mr. ZLOTNICK. Certainly.

Senator DEWINE. How does that work today?

Mr. ZLOTNICK. Under the Sentencing Guidelines——

Senator DEWINE. Excuse me. Just to recap, you have suggested, instead of going the enhancement route, that this be a factor or be factored ultimately more in the sentencing. I just wondered what is the status quo on that.

Mr. ZLOTNICK. Dealing specifically with the gun issue, there is already provision for a 2-point enhancement for anyone who possesses a gun during a drug trafficking offense which automatically increases the sentence. Certainly, the committee can improve section 994 of the Code and make a suggestion or require the Commission to increase the penalty in such a way so that guns possessed in the course of a drug trafficking offense or used or brandished in close proximity are punished, and leave it to the commission to come up with a sliding scale that addresses the types of issues that have been raised in a number of the draft bills. So, that already exists.

The other thing, of course, I would note is that the more drugs you have, the more severe your penalty. The higher up you are in the organization, the more severe your penalty. If any violence is used, the more severe your penalty. So the Commission has taken into consideration many of the factors recognized as the worst-case scenarios by these witnesses and will already ratchet the sentences up, often much higher than the mandatory minimum set at the base level on the amount of the drugs. I think that that is the appropriate way to deal with policy issues such as this.

Senator DEWINE. I want to just make sure I understand what you are advocating, though. Your testimony is that this is already factored in. Are you saying that it should be factored in more in the Sentencing Guidelines? They should go back and say this is more points or this is more—I just want to make sure I understand.

Mr. ZLOTNICK. Mr. Chairman, if the committee is going to address the *Bailey* gap and wishes to go beyond just changing some language, I think the best way to do it is to direct that the use or carrying of a firearm, which are themselves broad terms—rather than using a mandatory minimum, that the Commission be directed to directly enhance sentences. There isn't even the need in the broadest picture for 924(c) as a separate mandatory minimum and the policy problem itself could be addressed through the commission.

Senator DEWINE. Let me move to broad policy, and I know we are already talking about that, but you made the statement "drug fortress" as something that I thought I understand you to say needs to be addressed somehow, versus mere possession on the other hand. Distinguish the two by example for me. You have already given examples, I think, of possession. I just want to make sure I understand what you mean by "drug fortress."

Mr. ZLOTNICK. I think these are the types of cases that I actually saw in the District of Columbia. We are talking about an active dis-

tribution point for drugs; for example, a crack house where a trafficker will leave a loaded weapon in close proximity, to use your language, to an amount of drugs with the intent to go and retrieve that weapon to defend their drugs or defend in some cases their proceeds from theft by a robber or by another drug dealer.

Under the current situation, if that gun is not within arm's reach, "carry" will, in fact, reach under most definitions. We have, for example, the search warrant where the defendant is in the bathroom with the water swirling and the guns and some other drugs are in another room. That gun would not be covered, and I think that language could be come up with by the Commission, or my second choice would be the committee, that could address that gap.

Senator DEWINE. But your point, though, is, as far as you are concerned in regard to public policy, that should be enhanced some way, however it is done. In other words, this is the type of thing we are trying to discourage.

Mr. ZLOTNICK. Absolutely.

Senator DEWINE. What if I add the factor that on the particular date in question when they hit the house with the search warrant, all the things are true, except the defendant just isn't there?

Mr. ZLOTNICK. I think if the Government can prove the connection between that gun and drugs and the defendant, I don't think the situation changes.

Senator DEWINE. It is always a proof question.

Mr. ZLOTNICK. Right, but what I would note to the chairman, I think—something that gets lost and as a former prosecutor I would like to point out to you is that in a well-investigated case, you will have undercover officer, informant, video and audio testimony, that ties the guns to the drugs.

What happens in a lot of these cases, particularly as we have federalized what are really for the most part localized State cases—quite frankly, what are sloppy or poorly investigated cases—we call them snapshots. There is just a snapshot. There is no additional activity. That is all we are left with, some drugs and a gun, and we want to tie them together. If the case were really thoroughly investigated, as good Federal cases are, those gaps are filled, and I am hesitant to suggest to the committee, to make up for sloppy police work, a statute that makes prosecution easier.

Senator DEWINE. Your example assumes you do not have a sale; you do not have testimony of a sale. Is that what you are saying?

Mr. ZLOTNICK. Right.

Senator DEWINE. You hit the place with a search warrant. It is his house or her house and you have got the drugs, and in my example you have got the gun and you have got the money, but that is all you have. I mean, you don't have an underlying sale that occurred 2 weeks before where you have a witness who is going to come in and say, yes, I am an FBI agent or a DEA agent, or I am a Greene County sheriff's deputy and, yes, I purchased drugs on such-and-such a date. You don't have that, is what you are saying.

Mr. ZLOTNICK. That is correct, and I think there are many of those cases out there.

Senator DEWINE. Does anyone disagree on the panel with Professor Zlotnick's statement that this is one of the types of things that

we should actually have an enhanced penalty for? Is there anybody on the panel who says that should not be, where the crackhouse—you go in; drugs are there, the gun is there, assuming you can prove your case that there is a nexus there. Does anybody have any problem with that?

Mr. HUNGAR. None at all. I think the Supreme Court stands alone on that.

Senator DEWINE. So that is one of the things we need to fix, OK. Let us go the other way, then. Let us look at his other examples that he refers to as coming under the rubric of possession, and why don't we just start with the first example he gave. That was, what, Kascor? Was that the name?

Mr. ZLOTNICK. Kascor.

Senator DEWINE. What was found in that home was two hunting rifles and two guns registered not to the defendant, to a boyfriend, I think.

Mr. ZLOTNICK. To the mother.

Senator DEWINE. To the mother, OK. Should we enhance the penalty on that? What is public policy here? Sergeant, let us start with you.

Mr. FLUCK. I think the point that——

Senator DEWINE. Assuming the facts as given; I mean, that is all you can do is assume the facts as related.

Mr. FLUCK. Assuming the facts that are given, I think what the doctor is saying is that we are making negative assumptions. For his basis to hold true, we are making the negative assumption that the weapon was not there for the use. Unfortunately, in 20 years of law enforcement, I don't go to work making negative assumptions.

I think all law enforcement in this country has to make the assumption of the worst. We have to assume that the weapon is there, that the weapon is a potential armament to do harm or kill the officers or other drug dealers. To make the assumption that just because there is a cultural acceptance of weapon possession—living in North Carolina, that does exist in many parts of the State. There is a cultural acceptance; there is a shotgun in the pickup truck.

But to make assumptions to the intent of the criminal can be deadly. I don't think that the court needs to be making assumptions as to whether or not there was intent to use that weapon. The intent makes it no less dangerous by its presence.

Senator DEWINE. Mr. Wilson.

Mr. WILSON. I agree with the sergeant to a certain extent. I think it is incumbent that if those weapons were readily accessible, then I think it applies under the statute.

Senator DEWINE. Well, should it, though, is the question.

Mr. WILSON. I think it should. I think if it is there, it is accessible, it is available for use, then I think the penalty should be enhanced. I am not sure about the hunting rifles, but the handguns, especially. To go to the other example in Minnesota, I worked in Minnesota and I don't know too many Federal prosecutors who would file charges on hunting rifles in someone's house.

But, again, I think if there are handguns involved and they are readily accessible, readily available, if they might under a seat

cushion or a desk drawer near where their drugs are stashed or their money is stashed, then I should certainly think myself that that would call for an enhanced penalty.

Senator DEWINE. Mr. Hungar.

Mr. HUNGAR. I think that it is hard to answer without knowing more of the facts.

Senator DEWINE. Excuse me, but just for the sake of the hypothetical, which was not a hypothetical, but we are going to make it into a hypothetical because we are going to assume certain things, that is all you have got. I am asking the question that if that is all you have and you don't have an undercover agent who said, hey, I have seen that gun before, let me tell you what he was doing with that gun, or she was doing with that gun—you don't have the situation where the gun is close to the drugs and it is obvious that they are housed or stored together. We don't have that situation. Barebones facts—we have got nothing else. What is the public policy there?

Mr. HUNGAR. Well, the public policy, of course, is that we do not want criminals who are engaging in drug trafficking crimes and violent offenses to arm themselves, to have guns available with the purpose or with the thought that they may use them at some point.

I think it is important to remember—and while I understand the concerns of the law enforcement officers here, and I don't disagree with them, I think it is important to remember that even if you adopt a possession standard, the statute does not criminalize all possession by persons who are also engaging in drug crimes or violent crimes. It has to be possession during and in relation to the offense.

While there will always be line-drawing problems at the margin, the courts have required more than merely a showing that there were guns in the house. For instance, you would have to show that the defendant was aware that the guns were there, had access to them, possessed them in some sense. If these guns were locked in the mother's closet, for example, and the defendant being charged didn't have reasonable access to them, I think that you should not impose liability. The question is whether the gun is being possessed by the criminal in relation to the crime in some sense, and so there are difficult line-drawing problems always at the margin.

Senator DEWINE. Sergeant, let me go back to a statement that you made, and I am going to read from your prepared testimony and I think you gave it almost verbatim. "The one statement I recall from my drug training over 10 years ago was from a DEA agent that said where there is cocaine, there is a gun. During my 4 years in drug investigations, I would continually find this statement to be true. However, few weapons recovered were found in the personal possession of the dealer. The weapon was either hidden nearby for easy access or handled by an associate, most times by these young apprentices."

I just wonder how that statement—first of all, I wonder if those on the panel who have law enforcement backgrounds disagree with that in any way. That would be, I guess, my first question. Does anybody have a problem with that statement, based on your own experience or your professional background?

[No response.]

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Senator DEWINE. I take it by your silence the answer is no.

Mr. WILSON. Well, to a certain extent. I think that in many instances, many drug traffickers will have bodyguards who are armed. They themselves, depending on their level, may not carry a weapon. I agree with the sergeant that many times these weapons are concealed in vehicles, in glove boxes, under seats, in briefcases. He may not actually have the weapon on himself, but I can tell you from my perspective that he has that weapon available in one form or another.

Senator DEWINE. So, therefore, based on this statement—where there is cocaine, there is a gun, but it may not necessarily be on the defendant—what are the public policy ramifications of these facts or this statement? Does anybody want to comment on that?

Mr. ZLOTNICK. Mr. Chairman, I think I would disagree to that as a categorical statement. One of the hypotheticals I gave, the Missouri methamphetamine case—methamphetamine isn't cocaine, but you often have similar populations or comparable populations dealing. Given the low amounts of narcotics that trigger the Federal penalties, I do believe it is a common, though not a majority experience, to have drug distribution rings that are nonviolent and that they are encapsulated.

Maybe at a higher level, there were weapons involved, but, for example, this group in Missouri that was dealing in methamphetamine exclusively to people they knew—there were no weapons involved in distribution, although some of the participants owned weapons and kept them in their homes. So I would disagree with that as a categorical statement.

Senator DEWINE. But in that case, all our discussion is sort of irrelevant because we don't have a firearm around anyway.

Mr. ZLOTNICK. Well, no, because when they do a search warrant to end the investigation, they find the legally registered firearms in the home and then tag them on because if there is a year-and-a-half conspiracy—I disagree with Mr. Hungar. During a conspiracy, if you possess the gun during the conspiracy, that is going to be enough to trigger 924(c), and prosecutors will charge it as they did in this Missouri case that I have discussed.

Senator DEWINE. We are kind of having a little free-for-all here. Anybody disagree with that? Let us just go back and forth; just jump right in.

Mr. HUNGAR. Well, I would just point out that it has to be during and in relation to, and certainly in many circumstances where the gun is in the home and the drug ring is also being run out of the home, the prosecution will be able to prove that the gun was possessed in relation to the crime, but that is not necessarily the case.

Senator DEWINE. You have got to make that connect; you have got to prove it.

Mr. HUNGAR. Right.

Mr. ZLOTNICK. I think over a year-and-a-half period, it becomes a lot easier to make some type of tangential or peripheral connection. At some point, this individual went home and stored some drugs at home, but none of the distribution took place in the home. It doesn't matter if the drugs were possessed at home. That is going to be enough, and I think that kind of tangential relation-

ship, when we are talking about an enhanced penalty, as Senator Biden talked about, is the public policy question.

We already have 5- and 10-year mandatory minimums, plus enhanced penalties under the guidelines, for these individuals. Do we want to reach that kind of marginal gun possession, given the experience and the public policy which allows and in some sense promotes gun possession in this country?

Senator DEWINE. Any reaction to that?

Mr. WILSON. Well, Mr. Chairman, I still think that the nexus between the drugs and the crime has to be proven. I have no problems with that, but if that can be proven by the prosecutor and by the investigating agencies, then I think it still deserves enhanced penalties. Given Mr. Zlotnick's scenario, without any other details, I might perhaps agree with him.

But I think if the investigating agency can prove that nexus and the prosecutor files those charges, then I think it deserves liability.

Senator DEWINE. And examples of that nexus would be what? Give me two or three scenarios. What is enough? I mean, what is a bare-minimum enough?

Mr. WILSON. I think a bare minimum would be if that weapon—if they conducted their drug sales in their parlor and that weapon happened to be found under a seat cushion in that parlor, I think that is a direct nexus, or perhaps in a desk drawer in a study or something, if that is where they did their business. Anything that I think is accessible and easily reachable by that defendant, I would think—of course, I am not a prosecutor, although there were times during my career that I wish I was.

Senator DEWINE. Probably a lot of times.

Mr. WILSON. Yes, sir. But I think in my own mind there is a nexus there and I think it is provable.

Senator DEWINE. Anybody else?

[No response.]

Senator DEWINE. Well, I appreciate everyone's testimony. This has been very helpful. If any of you wish to submit anything in addition to what you have brought today—if you want to send us additional information, that would be certainly welcome by myself, and I am sure the other members of the committee. I hope that we will be able to move some legislation, if not this year, at least next year, and we appreciate very much your testimony.

Thank you.

[Whereupon, at 4:01 p.m., the committee was adjourned.]

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